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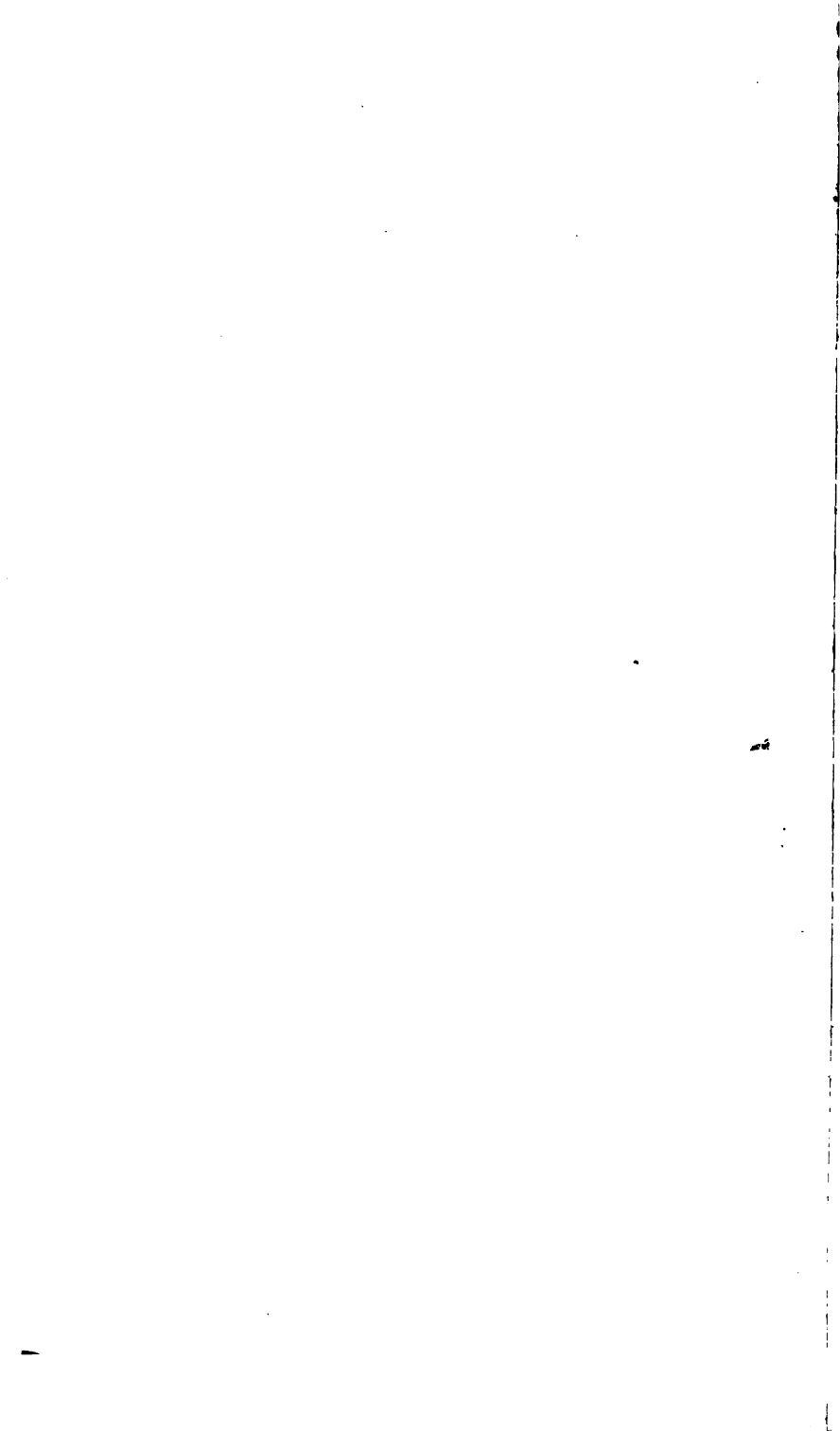
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DR
AS
DA



A N
E S S A Y
ON THE
N A T U R E A N D L A W S
O F
USES AND TRUSTS.

I N C L U D I N G
A T R E A T I S E
ON CONVEYANCES AT COMMON LAW;
AND THOSE DERIVING THEIR EFFECT FROM THE
STATUTE OF USES.

BY FRANCIS WILLIAMS SANDERS, Esq.
OF LINCOLN'S-INN.

D U B L I N :

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T O

JOHN STANLEY, Esq;

ATTORNEY GENERAL OF HIS MAJESTY'S LEeward

WEST INDIA ISLANDS, IN AMERICA,

AND MEMBER OF PARLIAMENT FOR HASTINGS;

S I R,

Y OUR general and extensive acquaintance with the laws of this country, and particularly with that branch of them, to which the following essay more immediately relates, was a sufficient inducement for me to request, that your name might sanction this work. But added to this, as you had the direction
of

of my professional studies, I thought no person so well entitled to the mark of respect, which is now offered by the first production of them, as their original promoter. With the highest sense of the honour, which you have conferred upon me by this and other testimonies of your approbation, I remain

Your most obedient,

and humble Servant,

F. W. SANDERS.

Monday, Nov. 14, 1791.

13. Great-square, Gray's Inn.

THE

THE design of the ensuing essay is to elucidate and explain the very abstruse branch of our law relating to the nature and doctrines of uses and trusts. In order to accomplish this end, it has been thought proper, besides giving a general knowledge of uses and trusts, to shew their peculiar operation upon the several conveyances now in practice. The author, therefore, has included, in this essay, a treatise upon conveyances at common law, and those deriving their effect from the statute of uses. The conveyances by feoffment and grant are particularly selected and explained as to their operation at the common law ; thereby making uses with respect to them a secondary consideration. As to fines, recoveries, surrenders, &c. their effects at the common law have been already, and at large, treated of by different authors ; and they are therefore in this work only introduced occasionally, as serving to explain some particular rule relating to uses.

In the execution of this work, and in its reception by the public, the author has every thing to fear from the consciousness of his own inability ; but at the same time he has much to hope from that liberality, which he has already and undeservedly experienced from gentlemen of the profession. As an incitement to the perfecting of this undertaking, he must here apply to himself the words of Lord Bacon,

who

who on the same subject thus expresses himself: " Herein,
 " though I could not be ignorant of the difficulty of the
 " matter, which he that taketh in hand shall soon find;
 " or much less of my own inability, which I had conti-
 " nual sense and feeling of; yet, because I had more
 " means of absolution than the younger sort, and more
 " leisure than the greater sort, I did think it not impos-
 " sible to work some profitable effect; the rather because,
 " where an inferior wit is bent and conversant upon one
 " subject, he shall many times with patience and medi-
 " tation dissolve and undo many of the knots, which a
 " greater wit, distracted with many matters, would ra-
 " ther cut in two than unknot: and at least, if my inven-
 " tion or judgment be too weak, or too barren, yet, by
 " the benefit of other arts, I did hope to dispose or di-
 " gest the authorities or opinions, which are in cases of
 " uses, in such order and method, as they should take
 " light one from another, though they took no light
 " from me."

GENERAL

GENERAL CONTENTS.

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Q N

ON THE
HISTORY, NATURE,
AND LAWS
OF
USES and TRUSTS.

WHATEVER might originally have been the causes of introducing USES and TRUSTS into this kingdom; whether they were first introduced by the clergy, in order to avoid the statutes of mortmain, or whether they were introduced on other accounts, we certainly derive our primal notion of them from the civil law. When men began to judge of the principles and effects of the *fidei-commissa* of the civilians, they soon found opportunities and reasons for adopting, or at least endeavouring to adopt, similar modes of conveying or devising their property. It may not then be unacceptable, or altogether unprofitable, before we enter into our enquiries concerning the laws relating to uses and trusts, to give an idea of the civil law, as it stood with respect to *uses*. The word *use* in the civil law is applied to more purposes than we find it in our law. That had its *usus-fructus*, and its *fidei-commissum*.

B

missum. The *usus-fructus* is defined to be
 “ a right to use or enjoy a thing which is
 “ not our own, preserving it whole and
 “ entire without spoiling or diminishing^a. ”
 This kind of use had the peculiar quality of
 determining by the civil or natural death of
 the person who enjoyed it: so that it was
 nothing else than separating the right of pro-
 perty from that of the present enjoyment;
 and in this sense it answers very well to our
 notion of a particular tenancy, which allows
 the present enjoyment to exist in the tenant,
 while the right to the inheritance remains in
 another^b. But this *usus-fructus* was not,
 properly and technically speaking, called a
use even among the civilians, for they made
 this distinction between a *usu-fruct* and a
 similar kind of use. i. e. That a *usu-fruct*
 was the right of enjoying *all* the fruits and
 revenues, which the estate, that was subject
 to it, was capable of producing; but that
use consisted only in a right to take out of
 the fruits of the ground, *such* portion of them
 as might be consumed by *use*, and which
 was necessary for the person who had the
use^c. Both the *usu-fruct* and the *use* expired
 by the natural or civil death of the person
 who had the right to them; which right was
 deemed personal^d.

Thus we see that neither the definition of
 a *usu-fruct* or *use* at all answers to *our* idea of
use. The division of the civil law which an-
 swers nearest to our *use*, is called by the wri-
 ters of that law *fidei-commissa hæreditas*, or
fidei-

^a Domat. lib. 1.
 §. tit. 11. f. 1.
 f. f. l. 1.

^b Ba. uses 19.*

^c Dom. lib. 1.
 tit. 11. f. 2.

^d Ibid. f. 6.

* The edition of Bacon's reading on uses referred to in the
 course of the ensuing work, is that in 8vo. 1785.

fidei-commissum universale. Those were the appellations given to it by the Roman law, whilst Monf. Domat calls it simply a *direct substitution* or fiduciary bequest. This kind of use arose upon testamentary donations, and it was called a *fiduciary* bequest, or *fidei-commissa hæreditas*, to distinguish it from two other kinds of bequests or substitutions; so that the civil law acknowledges three kinds of bequests or substitutions. The first was called a *vulgar* substitution; the second a *pupillary* substitution; the third a *direct* or *fiduciary* substitution or bequest, or according to the Roman law a *fidei-commissum*. The *vulgar* substitution is defined^c to be the
 “ institution of an executor who is called in
 “ *default* of another, who either cannot or
 “ will not take upon him that quality;”
 and is nothing more than the appointing one person as executor in default of another. Lucius Titius hæres esto, si mihi Lucius Titius hæres non erit, tunc Seius hæres mihi esto^f. This substitution differs from our conditional estates only in this, that the condition in the former case is in default of the first executor, but in the latter the condition is, that if the donee die without such particular heirs as are limited in the gift, that then the lands shall revert to the donor^g. The
pupillary substitution allowed the father not only to dispose of his *own* lands and goods to his child under age, and in default of him, or in case he died under a particular age, to another, but also the child's *own* goods in the same manner; thereby not only making his own will, but that of his child's also^h.
 This kind of substitution very justly gives an

^c Domat. lib. 5.
tit. 1. f. 2.

^f F. f. l. 1.
f. 1. de vul. e
pup. sub.

^g Cow. inst.
lib. 2. tit. 15.

^h Domat. lib.
5. tit. 2. f. 1.
ar. 1. 5.

opportunity of censuring the protection, which the civil law has afforded it. The *direct* substitution or *fiduciary* bequest, or according to the Roman law the *fidei-commissa hæreditas*, is the last, and indeed is the substitution which most resembles our explanation of use or trust: and it is to this sort of substitution that we owe our first introduction of uses. I call it *fidei-commissa hæreditas*, in distinction to the generality of the expression *fidei-commissum*, for this latter, I apprehend, also includes the pupillary substitutionⁱ. This *fidei-commissa hæreditas* seems first to have been invented on account of some disability in the devisee to take lands of inheritance. Thus were the *deportati* and *peregrini* situated; so that when a testator intended to leave his lands to this description of people, he was obliged to give them first to his executor with terms of *intreaty* to deliver them to the devisee or *cestuique* trust. This is explained by the definition we find of this kind of trust; “est ultima voluntas, quæ quid verbis *precariis*, non civilibus per *interpositam personam*, alicui relinquitur^k.” The manner of making this fiduciary bequest was this, viz. “Rogo te Luci Titi cum primum poteris hæreditatem meam adire, eam Caio Seio reddas, restituas^l.” If the executor or heir therefore did not perform the trust reposed in them, the *cestuique* trust had no remedy; for the trustee was bound “nullo vinculo juris, sed tantum *pudore*,” that is, by his own conscience only. It is said, that as the *cestuique* trust had no remedy, the testator was induced to use more strong, or rather more *subtle* terms of *intreaty*, and expressed

ⁱ Ibid. lib. 5.
tit. 1.

^k Just. Inst.
lib. 2. pa. 765.
duo.

^l Vide Dom.
1. 5. tit. 2.
§. 1. ar. 1. n. b.

expressed himself "*Rogo te per salutem Augusti*," or the like. This kind of intreaty was evidently introduced, that upon the breach of any trust, and upon complaint to Augustus, he would be induced to interfere, and see equity properly administered, taking the breach of the trust to be in derogation of himself. When *cestuique trust* therefore perceived the trust to be neglected, or misapplied, he made his suit to Augustus, through whose favour and influence he obtained redress. This occupation, into which Augustus was involuntarily drawn, must soon have been rendered very disagreeable and irksome. Upon this account Augustus ordered the consuls, upon applications of this nature, to exercise the authority which he had formerly done. At length the custom of applying against breaches of trusts became so common, that it was thought necessary to create a prætor, who should have the particular power of examining into those matters. This person was denominated, from the office which he held, *fidei-commissarius*. Justinian^m upon this head has given us the following passage, after having made a previous mention of the original state of these trusts: "*Postea divus Augustus primus, semel, iterumque, gratiâ personarum motus, vel quia per ipsius salutem rogatus quis diceretur, ob insignem quorundam perfidiam, jussit consulibus, auctoritatem suam interponere. Quod quia justum videbatur, et populare erat, paulatim conversum est in assiduam jurisdictionem. Tantusque eorum favor factus erat, ut paulatim prætor proprius crearetur, qui de fidei-commissariis jus diceretur,*"

^m Just. inst.
lib. 2.

page 765, 766.

"retur, quem fidei-commissarium appellant."

"Vide Ba.
uses. 19.

According to this short account of these fiduciary bequests, we see that they depended, in their commencement, upon the honesty of the heir or executor. They afterwards assumed a more regular and certain course. At length it was found proper to render the estate of cestuique trust in every respect equivalent to the legal ownership. This was effected by the two decrees of senate called *Senatus consultum Trebellianum, et Pegasianum* ^u. The decrees here alluded to resemble in effect the statute of 27 H. 8. which draws the possession to the use, and, as it were, incorporates them. This will come under our future consideration.—Indeed, if we compare the rise and history of the fidei-commissa of the Roman law, to the origin and progress of our laws of uses and trusts, we shall find them to have a great resemblance. It must be admitted that the cause of introducing trusts into the civil law differed from that which occasioned their introduction into this country. Their origin in the civil law proceeded from testamentary dispositions; whilst it is very clear that conveyances to trusts gave us the first notion of them. However, whether we *convey* in trust, or *devise* in trust, the idea of a trust must be the same in both cases. With respect to the fidei-commissa of the civilians, it is further observable, that though the niceties of uses and trusts are so much and so generally complained of in our law, yet the determinations relating to them in the civil law are so numerous, that Peregrinus has written a large folio volume

volume de fidei-commiffis, (and as he expreffes it) prefertim de univerfalibus, or de hæreditatibus.

A *ufe* with us is defined to be “ a *trust* or “ *confidence*, which is not iffuing out of land, “ but as a thing collateral, annexed in privity “ to the eftate, and to the perfon, touching “ the land; fcil. that ceftuique ufe fhall “ take the profits, and that the terretenant “ fhall make eftates according to his direc- “ tions.” By this definition we fee that a *ufe* is defcribed to be a *trust*. This would naturally lead a perfon to imagine that there exifted no difference between thefe two words; and indeed it muft be admitted that *ufe*, in its common acceptation, generally annexes the idea of a *trust*, efpecially when we fpeak of them, as exifting before the ftatute of ufes. However, if we attend to the following account of ufes and trusts, we fhall find, that even previous to the paffing of the ftatute of ufes, in the reign of Henry the eighth, there was a *settled* diftinction between ufes and trusts. In the enfuing pages, I fhall endeavour to trace the origin and progreflion of ufes and trusts. In doing this, I fhall attempt to point out the difference between them, as known before the ftatute of ufes. I fhall only premife in this place, that *ufes* were of a *permanent*, and *general* nature, and that a regular fyftem was adopted with refpect to them even at the common law. But trusts were of a *fpécial*, or collufive and tranfitory nature, and at the common law they *were*, and ftill *are*, unnoticeable, and not of the fmalleft confideration.

• 1. Co. 121.

a. b.

Vide Ba. uſes.
p. 8.

Various have been the conjectures concerning the period, when uses and trusts were first introduced into this kingdom. Many writers on this subject have been induced to date their origin at a very early time indeed. Hence it is that some fancy they were known in the reign of Henry the third. This opinion is occasioned by the statute of Marl-
 52 H. 3. c. 6. bridge °, made in the 52d year of that monarch's reign, which relieves against false and covinous feoffments, made to defraud the chief lords of their wards. However, this statute, I apprehend, does not warrant any such conclusion. The feoffments here alluded to were feoffments upon *condition*, and not upon *trust*: and the very words of the statute tend to shew that the *feoffor* took it out of the power of the *feoffee* to injure him, by annexing a *penalty* to the non-performance of the agreement. That neither uses nor trusts were known at that time is very evident from the circumstances attending the succeeding king's reign (Edward the first): for the clergy, who were then endeavouring *arte vel ingenio* to bring lands into mortmain without licence, it seems were not yet acquainted with the utility of uses and trusts.
 * 7. Ed. 1. The statute de religiosis ^p does not take any notice of uses or trusts; and this statute was principally made to prevent alienations in mortmain. Had uses or trusts been known among us at that time, the clergy it is certain would have taken advantage of the knowledge of them; for we may fairly suppose that they were more conversant in the civil law, than the laity.

Some

Some have supposed that trusts were received very early among us on account of the writ called *causa matrimonii prælocuti*. Thus, if a woman had given lands in *fee* or for *life* to a man, to the *intent* he should marry her, if the man did not marry her, the common law gave her this writ of *causa matrimonii prælocuti* to recover her lands^a. So if the woman had given the lands to a *stranger*, to the *intent* to give the lands to her, and to her intended husband, the same writ was given her, if the marriage did not take effect^c. This writ, we must observe, was given to the woman by the common law, which alone gives us an ample reason to conclude that the *confidence* reposed in the husband or stranger, was neither a use nor a trust. For it is a rule that whenever a remedy is given against uses or trusts, that remedy is afforded by an *express statute*, and not by the *common law*^d. Besides the grant of the lands in either case was upon a *condition in law*; which condition would make void an estate acknowledged by the common law, as a fee simple, or estate for life, though it could not avoid an estate created by a statute, as an estate tail^e. It has been further said that uses and trusts were introduced about the reign of Edward the second^f; but I have found nothing which could induce me to form such an opinion.

^a P. N. B. 471.

^c F. N. B. 471.

^d Poph. 77.

^e F. N. B. 471.

^f Vide Brent's case, 2 Leon. ca. 25. per Harper.

But I think we may clearly fix the commencement of *trusts* in the reign of the third Edward. For in the first place, *Brook* in a note upon a case reported in the year book of that reign^g (where feoffees sued by petition to the king) thinks it very worthy of observation.

^g 44 Ed. 3. 25.

obser-

* Bro. Tit.
fcoff. al. uses.
pl. 9.

* Ba. uses. 23,
24.

* 50 Ed. 3. c. 6.

Vide 2 Rich.
2-c. 3. sec. 2,

observation that trusts were known in those days *. However, lord Bacon says, that both this case, and the book of 8. *Aff.* (where a fine was levied in *autre droit*) are but implications of no moment *v.* But granting that these cases are but implications of no moment, yet the statute 50 Ed. 3. * clearly proves that *special trusts* were then in practice. By that statute we find that divers people, in order to cheat their creditors, made fraudulent conveyances to their friends upon trust and collusion, to have the profits at their disposal. The statute runs thus:—" Because that divers people inherit of divers tenements, borrowing divers goods in money, or in merchandize of divers people of this realm, do give their tenements and chattels to their friends by *collusion* thereof to have the profits at their will, and after to flee to the franchise of Westminster, St. Martin le Graund of London, or other such privileged places, and there do live a great time with an high countenance of other man's goods, and profits of the said tenements and chattels, 'till the said creditors shall be bound to take a small parcel of their debt, and release the remnant: It is ordained and assented, that if it be found that such gifts be so made by collusion, that the said creditors shall have execution of the said tenements as if no such gifts had been made."

With respect to this statute, I must observe, that though the word *trust* is not mentioned in it, yet it is very evident that the conveyances, which it complains of, were upon fraudulent trusts. But the trusts here alluded

ed to were not properly speaking *uses*, as I shall attempt to shew in a subsequent page. Conveyances, however, of a similar nature were soon after put in practice. In the beginning of Richard the second's reign, we find that people, in order to defeat the actions of those who had a right of action against them, as being in possession of lands, made secret conveyances, by which means the demandant was ignorant against whom to bring his action. To remedy this mischief, a statute^b was made, authorising the demandant to bring his action against the perners of the profits. b. 1 Rich 2.c.9.

The *trusts* hinted at in this as well as the 50 Edw. 3. are not *uses*. These trusts are of a *special*, and *transitory* nature. They had not the *permanent* quality of a *use*. The true distinction, I take it, between *uses* and *trusts*, when both were in their infancy, and until the statute of *uses* was passed, consisted in this, viz. a *use* was properly so called, when a man made a feoffment *in fee* to a friend, by which the *possession* or *seisin* being transferred to the feoffee, the feoffor placed a confidence in him to permit such person or persons as he should or had named, to receive the profits; and also to make such *legal* estates as such person or persons should direct. This confidence was the *use*: for here the feoffee had a *permanent* estate *in fee* in the lands, subject, however, to the *use*, or distribution of the profits. This *use*, on account of its dividing the land into two estates, viz. an estate in the land, and an estate in the *use* or profits, was reduced into a regular system. But a *trust* did not, in its *original* meaning, make this

this regular division of property into use and possession, but it rather signified, that a man had made a conveyance of his lands to another, by which conveyance he not only gave the *possession*, but also the *use*, or right to take the profits, to the grantee: but there was a kind of *personal* trust reposed in the grantee, that he would retain both the possession and use in order to answer some *special* intent or purpose. I will not give, as an instance of this kind of trust, the trusts complained of in the two above-mentioned statutes; for the conveyances they allude to seem indeed to make a *fraudulent* division of the possession, and profits—though I must observe, with respect to them, that *uses* are not *now* reckoned to be of a *fraudulent* or *covinous* nature, and that these conveyances in *trust* to deceive creditors would at this day be presumed to transfer the *use* to the grantee before the *special* *trust* could be satisfied. But to put a plainer case, if a conveyance was made to a man, in trust or to the intent to make another conveyance to a third person, here the trust placed in the grantee was not to pay over the profits, but to dispose of the profits and the possession: This trust was then of a *special*, *transitory*, nature, and not a use. I say it was not a use *before* the statute, because such a trust or intent would not now be executed by the statute^x. For if we consider this case as happening *since* the statute of uses, it will place the distinction I have taken between a *use* and a *trust* in a still more accurate point of view. If a man by recovery, fine, or feoffment, conveys lands to one (without declaring any use, and there being no consideration),

^x Shep. T. 501.
Ed. 5.

tion), in trust or to the intent that he should convey to a stranger; in order to make this conveyance, and to perform the *trust*, the grantee must have in him both the *use* and *possession*^c, though the former is not expressly declared to him*. Now, as the use is not expressly declared to the grantee, and as by a construction of law the use is implied to be in the grantee, it is very plain that the execution of the *use* is but a preliminary and necessary step towards the performance of the *trust*. Construing the use to be in the grantee in this case *since* the statute, is only to give that efficacy to the *intent* of the conveyance, which it must have had before the introduction of uses, when the *possession* and the *right to the profits* passed by a conveyance of the *land*. However, the doctrine of uses has certainly made an improvement in this kind of conveyance in trust: for it is said, that if a man makes a conveyance to the intent to make another conveyance, without declaring any use, and the grantee does not make the conveyance in a *convenient* time, then the use will result to him who made the conveyance^d, and thereby render the performance of the trust impossible. I must also observe that the words, *trust*, *confidence*^e, or *intent*^f, may of themselves in some instances create a *use*, especially when the intention of the

^c Moor. 103.
pl. 248. Dy. 166,
a. in margine.

^d Dy. 166. a. in
marg.

^e Vide 27 H.c.
10.

^f 4 Leon. a. pl.
3.

* According to *Holt, J. C.* if a feoffment is made, or fine levied to a man and his heirs, to answer a particular intent, or *special trust*, the estate is in the feoffee or conuzee, by way of *common law*, and not by way of *use*, and after the intent is effected, the *use* will arise from the feoffor, or conuzor by construction of law. *Gilb. Rep.* 16, 17.

8 Dy. 166. a. in
marg.

the parties appears to favour such a construction. Therefore the case cited in the margin of Dyer⁸ does not contradict the foregoing remarks; for it appears, by the indentures to lead the *uses* of the fine in that case, that the intention of the parties was that the conuzee should stand seised to such *uses*, as the conuzor should appoint; and of course the *uses* were executed by the statute upon such appointment.

9 Ba. uses. 8.

10 2 Salk. 676.

11 Ba. uses. 8.

Vide post.

So likewise, if a man is enfeoffed to the *intent* or in *trust* to be re-enfeoffed, or to the *intent* to be vouched^h, or to the *intent* to suffer a recoveryⁱ, none of these *intents*, or *trusts*, are *uses*^k. For indeed in all these cases, as in the first, the *land* and the *use* must be construed to remain in the grantee, *in order* that the *trust* or *intent* may be executed. But the reader will better understand these distinctions as he proceeds in the following account of *uses*; for the *use* and the *land* are *now* so entirely connected together, that in order to perform any of these *trusts* or *intents*, the *use* as well as the *land* must pass to the grantee^l.

1 Moor. 103. pl.

248.

12 7 Rich. 2. c.

12.

Uses were certainly introduced in the reign of Richard the second. Soon after his coming to the throne, a statute was made, which provides, that no alien should purchase any benefice or occupy the same, either to his own *use*, or to the *use* of another^m. This is the first statute, which expressly mentions the word *use*. The next experimental step with respect to making conveyances to *uses* was tried by the clergy, in order to avoid the statutes of mortmain; for though they could not buy lands in their own names, yet they thought they might so far evade the statutes by obtaining

ing grants, not directly to their religious houses, but to the *use* of their religious houses : But the legislature soon interfered, and, by a statute made 15 Richard 2. c. 5. it was enacted, that the lands so purchased to uses should be amortized by licence from the crown, or sold to private persons ; and that uses should be subject for the future to the statutes of mortmain, and forfeitable like the lands themselves.

The uses mentioned in these two statutes were of a permanent nature, and the purposes for which they were created, and their known power of evading the law, certainly gave us the idea of continuing them. The causes, however, of their *continuance* after these two statutes, and the favourable construction, which they have received at times, must be owing to the purposes for which they were created directly *after* these two statutes. The uses complained of in these statutes were certainly of a *covinous*, though permanent nature. But we cannot wonder why the clerical chancellors of those days encouraged their commencement. The statutes of mortmain affected themselves ; and in aiding their brethren in evasion of the statutes, they assisted their own interest. But the encouragement, which the chancellors gave to uses was of no avail, and the inventors of uses derived very little advantage from their contrivance. The legislature was determined that *uses* should never be of service to the two purposes for which they were introduced. Therefore, though they originated in covin, yet their continuance proceeded from very equitable motives, as will be shewn hereafter. Upon
this

this account, or reason of the continuance of uses, it is, that we do not allow at this day a use to be considered as being *covinous*ⁱ, or *collusive*. Therefore lord Bacon makes a distinction between *covin*, *confidence* (or *trust*) and *use*^k, which distinction he says should not be confounded.

ⁱ Ba. uses. 8.

^k Ibid. 8.

The *introduction* then of uses certainly originated in *fraudulent* circumstances: upon this account we may naturally suppose that they received no countenance from the courts of law or the *legislature*. And as the courts of equity were principally instituted to prevent *fraud*, they could not (however the chancellors of those days might be induced to act to the contrary) consistent with their publick conduct and office, give their *entire* support and sanction to transactions, the production of fraud. So that while uses continued in this state, there could be but very few (if any) *rules* adopted with regard to their construction; at least the books are silent upon this head. It must be remembered that the disputes between the houses of York and Lancaster originated in the reign of Richard the second. Their unfortunate quarrels had deluged the kingdom in blood, When then the inducements of safety, or the rage of party, influenced men to embrace one side or the other, still the anxiety, which men possessed to retain their fortunes and estates in their own family, perhaps through pride, and perhaps from kinder motives, led them to seek means of preserving their estates from forfeitures, before they ventured to enter into these civil broils. To effectuate these wishes, nothing could happen more opportunely than the

the idea of giving their estates to one indifferent person, to the use of the persons who were intended to be benefited by the trust. Now there appeared two ways of limiting these estates to uses. The most plain and simple was that of giving or conveying lands, in the *life-time* of the grantor, to such uses as were directed in the deed, or by parol signification: Whilst the other served to give a power over *uses* that was not suffered by the common law over the *lands*—that of devising: for though the lands were not permitted to be devised by will, yet it was thought, that if a man made a *feoffment* to such uses, as he should by his will appoint, though this could not operate as a devise of the lands themselves, yet certainly it could as a devise or appointment of the use, which appointment would be binding in conscience. By either of these dispositions it was thought the lands would be saved from forfeitures. The causes then which induced men to *continue* uses at this period were extremely different from their production. The original production of them was occasioned by fraud—the continuance of them proceeded from that anxious sensation, which it is hoped every honest person possesses. Here then was an ample field for that court, which is particularly instituted to observe the consciences of men, to exert its influence. It had an opportunity of distributing an equitable protection to those which the *extremum jus* of the common law denied, and of this opportunity, we have reason to believe, they took the most favourable advantage: for it is supposed, that about the reign of Edward the 4th, the courts of equity

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began

began to adopt a regular system with regard
 to uses^l. For in the year books of that mo-
 narch's reign we find many cases relating to
 uses^m. However, there were cases expressly
 relating to uses before this period: though,
 lord Bacon says, there were not above six in
 allⁿ. But to proceed in our historical pro-
 gress of uses, from the 15 Richard 2. to the
 reign of Henry 6. the statute book seems to
 be very silent on this head. Therefore, very
 few alterations and innovations could have
 been made in the learning of uses, with regard
 to their equitable construction or abuse of
 justice. The statutes of 4 Henry 4. c. 7.
 and 11 Henry 6. c. 3. (which indeed are the
 only statutes I can find relating to uses, dur-
 ing these reigns, and that of Henry the 5th)
 were only enacted to confirm and enlarge the
 1 Richard 2. c. 9. which we have before
 explained. The 5th cap. however, of the 11
 Henry 6. shews that the knowledge of *trusts*
 had taught the cunning part of men a very
 subtle manner of committing injuries with
 impunity, contrary to the established laws of
 the country. It seems that tenants for lives
 or years, who were subject to actions of waste
 by the reversioner, upon their commission
 of it, had taken advantage of the doctrine
 of uses and trusts, in order to escape the pu-
 nishment, which otherwise ought to have
 been inflicted upon them by the person who
 claimed the reversion and freehold. To this
 intent they conveyed their estates to their
 friends in trust for themselves, and after that
 they committed waste and destruction on the
 lands at their pleasure; they still continuing
 to occupy the premises, and take the profits
 to

^l Vide Ba. uses.
^{17.}

^m Vide 5 Edw.
⁴ 7. a. b.
³ Edw. 4. 5.

ⁿ Ba. uses. 17.

to their own use: for the reversioner being ignorant of the *legal* owner of the lands, did not know against whom to bring his action. But the legislature soon put a stop to this invention. For by the 5. c. of Henry 6, " it is ordained and established, That they in the reversion in such case may have and maintain a writ of waste against the said tenants for term of life, of another's life, or for years, and so recover against them the place wasted, and their treble damages for the waste by them done, as they ought to have done for the waste committed by them before the said grant and lease of the estate- Provided always, That this ordinance hold not place, but where the first tenants, before the lease and grant of their said estates, in the manner and form abovesaid were punishable of waste; and also, where after the said grant and lease the said first tenants of the said lands and tenements take the profits at the time of the waste done to their own proper use." But these conveyances by these tenants for lives and years, were more properly conveyances in *trust* than to *uses*, as I shall in another part of this essay endeavour to shew. However, these are the only statutes relating to uses and trusts during these three reigns. Indeed, in Henry the fifth's time there is no statute concerning them. There are also very few reports of cases in the year books at this period touching this learning. There are a few, and amongst those are 11 Hen. 4. 5, 45. 5. Hen. 5. 3. b.

From the 11 Hen. 6. to the reign of Richard the third, which includes the space of fifty
C. 2 years,

years, the statute book is totally silent on the subject of uses. From this circumstance Lord Bacon thinks that unquestionably uses were most favoured about that time^o. Indeed there is great reason to believe that that actually was the case; especially if we consider the statute made in the first year of the reign of Richard the third. In order to give some idea of the causes of enacting that statute, we must necessarily anticipate here a few observations, which were intended for another place. Indeed to understand it properly we should consider the whole nature and different situations of the feoffees, and cestuique use. But the full consideration of that must be deferred till we have finished our historical account of the statutes relating to uses. Suffice it at present to observe, that the power of the feoffees, about this time, was much more confidential than it stood just before the making of the statute 27 H. 8. c. 10. But this is not to be wondered at, if we remember their original institution. I shall now only speak of the power of the feoffee and cestuique use with respect to *alienation*. At this period the feoffees not only possessed the whole estate in the land^p, but also, like absolute owners, had the whole ability to give or dispose of it as they pleased. In short they were reckoned in many cases as complete proprietors of the land (as will be shewn hereafter) with this difference only, that if they had granted the lands *without* notice, or without a good consideration^q, that in either case the second feoffees would have been seized to the former uses, in the same manner as the first feoffees were. And moreover, it,

^o Ba. uses. 27.

^p 1. Co. 131. 2.

^q Plowd. 351.
ed. 1684.

seems

seems that the cestuique use could always have compelled the feoffees or teretenants to make such conveyances as he should direct, either by executing the use to himself, or by transferring the land itself to another.^r But this he was only compellable to do by subpoena out of chancery.^s Still however, the feoffees, until such compulsion by the court of chancery, could make feoffments for a bona-fide consideration, and without notice; which feoffments would be good against the cestuique use, and all others.^t But notwithstanding this power of the feoffees, the cestuique use might have aliened, or transferred his *use* by the common law; that is, he might have transferred the use or equitable right to the profits of the lands to another.^u But the alienee or purchaser was in the same precarious situation, with respect to the feoffees, as the cestuique use himself was; for as to the possession of the land, *that* he could not meddle with or dispose of, unless by suit in chancery, or by permission of the feoffees; and even if the feoffees suffered him to be in possession, and being so, he made a feoffment, this feoffment was supposed not to pass the lawful possession to the feoffee, without the concurrence of the first feoffees. Whereupon the first feoffees used to enter upon the second feoffee, which caused the parties to seek relief in equity, and occasioned the utmost vexation.^v Upon which account it is natural to suppose that many new cases arose upon the doctrine of uses, or, as it has been expressed, we may imagine, that the "consciences of the feoffees, and others who were trusted, be-

" came

^r Vide 37 H. 6.
^s 35. Bro. tit.
 feoffment al
 uses. Pl. 14.
^t 1. Co. 121. b.

^u 1. Co. 101. b.
 Plowd. 351.

^v Ba. uses. 16.

^v Gilb. uses. 27.

" came too large, and would not perform the
 " trusts reposed in them w." To remedy,
 therefore, these inconveniences, and to give a
 better security to bona-fide purchasers (and
 not, as is generally believed, to afford greater
 advantages to the cestuique use than he pos-
 sessed before) was the statute of Richard the
 first enacted. The statute recites, " Because,
 " that by secret and unknown feoffments
 " great unfurety, trouble, costs, and grievous
 " vexations do daily grow betwixt the king's
 " subjects, insomuch that no man that buyeth
 " lands, tenements, rents, services, or other
 " hereditaments, nor women which have
 " jointures or dowers in any lands, tenements,
 " and other hereditaments, nor the last will
 " of men to be performed, nor leases for
 " term of life or years, nor annuities granted
 " to any person or persons for their services
 " for term of their lives, or otherwise, be in
 " perfect surety, nor without great trouble
 " and doubt of the same, by reason of such
 " privie and secret feoffments: For the re-
 " medy whereof, it is ordained, established,
 " and enacted, by the advice of the lords
 " spiritual and temporal, and the commons
 " in this present parliament assembled, and
 " by authority of the same, That every estate,
 " feoffment, gift, release, grant, leases and
 " confirmations of lands, tenements, rents,
 " services, and other hereditaments, made or
 " had, or hereafter to be made or had, by
 " any person or persons being of full age, of
 " whole memory, at large, and not in dures,
 " to any person or persons, and all recoveries
 " and executions had and made, should be
 " good and effectual to him to whom it is so
 " made,

“ made, had, or given, and to all others to
 “ his use, against the seller, feoffor, donor,
 “ or granter of the same, and against the
 “ sellers, feoffors, donors, or granters, and
 “ his and their heirs, claiming the same only
 “ to the use of the same, as heir or heirs to
 “ the same sellers, feoffors, donors, or gran-
 “ ters, and every of them, and against all
 “ others having or claiming any title or in-
 “ terest in the same, only to the use of the
 “ same seller, feoffor, donor, or granter, or
 “ sellers, donors, or granters, or his or their
 “ said heirs, at the time of the bargain, sale,
 “ covenants, gift, or grant made: saving to
 “ every person or persons such right, title,
 “ action, or interest, by reason of any gift in
 “ tail thereof made, as they ought to have if
 “ this act had not been made.”

This statute was evidently intended for the
 benefit of purchasers, by giving the cestuique
 use an alienable power over the possession, as
 well as the use. But the intention of the le-
 gislature in befriending the purchaser in this
 manner was entirely frustrated: for the
 statute does not take away the power of the
 feoffees to make feoffments, as they did before
 the statute *: for the estate of the land con-
 tinued in them, till a disposition of it, either
 by themselves, or the cestuique use. The
 statute only encreased the power of the ces-
 tuique use, making his feoffment valid against
 those of the feoffees, which was not so before
 the act. The estate then in the lands re-
 maining in the feoffees, they found means,
 contrary to the trust reposed in them, to
 make secret and covinous feoffments, pre-
 vious

* 1. Co. 132.
 8. b.

vious to any disposition made thereof by the cestuique use, whereby the cestuique use was disabled from executing that power which the statute meant to afford him. Besides this inconvenience, there was a still greater one produced by this statute; for it often occasioned a kind of double-handed proceeding, or fraud in both the feoffees and cestuique use. The feoffees had a power over the possession by the common law, and the cestuique use by the statute. They therefore oftentimes, by collusion, made secret and different feoffments, which prevented and defeated each others alienation, and thereby deceived purchasers. But though the intent of the statute was overturned in this respect, yet it unavoidably produced new cases, and required particular expostitions. I shall, therefore, by way of digression from the statute account of uses, make a few observations concerning this statute.

It has been a question of some importance, and perhaps not yet decided in our books, whether any or what part of the ancient estate, which was in the feoffees before any disposition by the cestuique use, still continued in them after the feoffment or alienation by the cestuique use. This is, however, a question which must be governed by circumstances; that is, there may be one case, as I take it, where all the estate and right of entry may be entirely out of the feoffees by the conveyance of cestuique use, whilst in another case at least a *right of entry* may continue in the feoffees, notwithstanding

ing such alienation by the cestuique use. As an instance of the former case, if cestuique use in *fee* should make a feoffment in *fee*, according to the 1 Richard 3. c. 1. it seems that the whole interest of the feoffees is taken away, and given to the second feoffee, and therefore not any estate remains in them. Upon this principle it has further been held, that if there be cestuique use in *fee*, and he makes a feoffment in *fee* upon condition of re-entry, and afterwards the condition is broken, and the cestuique use enters, after this entry he shall retain the lands for ever against the feoffees ¹. For their interest in the lands is divested by the feoffment of cestuique use. The reason of this case however seems to differ from another of the same nature; for if a baron, seised in right of his wife, makes a feoffment upon condition, and enters for the condition broken, the right of the wife is not thereby extinct ².

¹ 2 H. 7. fo.
25. Bro. tit.
feoff. al. uf. pl.
18. Co. Litt.
103. a.

But though the law stood thus with respect to the alienation of a cestuique use in *fee* by the statute of 1 Rich. 3. yet we must make a distinction when cestuique use had only a particular estate in the lands, as for term of life, &c. with a remainder over, or where he was tenant in tail with such a remainder. For, I apprehend, that after the death of cestuique use, and after his feoffment, the feoffees had a right to enter to revive the former uses; which clearly shews that either the remaining part of the use, after the particular estate of cestuique use was determined, continued in them, or if it was entirely out of them, that they had a right

² 5 H. 7. 5.
b. 6. a. Vide
also Co. Litt.
30. b.

right to revest it after the demise of cestuique use by their entry. Their distinction however has been doubted by some, who thought that the feoffees would have had no title of entry after such a feoffment or other alienation. The cases cited to authorize this last doctrine are chiefly taken from Dyer's reports.

Dyer 88. b.
89. a.

Thus, in a case in the seventh year of Edward the Sixth's reign, where one Davis being seised in fee enfeoffed J. L. and others in fee, in the 19th year of Henry the 8th, to the use of his wife for life, remainder to his brother in tail, remainder to B. H. in tail, remainder to the right heirs of the feoffee. Afterwards, in 24th Henry 8. Davis and his wife levied a fine with proclamations to Sir H. W. and others in fee, *to the use* of Sir H. W. and his heirs in fee. The brother, the first in remainder, joined in the fine in the 32 Hen. 8. Sir T. W. son and heir of Sir H. W. bargained and sold the lands to the king in fee. After this the brother died, and then the wife died, J. L. the surviving feoffee, brought his petition, and this matter was found by the verdict. In arrest of judgment, it was alledged for the king, that the petition did not lie for the feoffee, because the fee simple in the use was lawfully conveyed away by the feoffor to Sir H. W. And therefore he could not enter to revive the uses, because he could not be seised of the fee simple in the same manner as he was before the alienation. However, this case does not appear to be determined; and there-

therefore Dyer adds, "Et ideo quære inde."

However, in a case sent out of chancery for the opinion of the judges, they decidedly were in favour of this opinion. It was thus: there was cestuique use in tail, remainder over in tail, remainder to the first cestuique use (in tail) in fee. Cestuique use in tail before the 27 H. 8. made a feoffment to the use of himself for life, remainder to his first son (being heir in tail) and his wife for their lives, remainder to the heirs of their bodies, remainder to the use of the right heirs of the feoffor. The feoffor died, and the first feoffee entered to revive the first uses in tail. Dyer and Manwood were both of opinion, that the entry of the feoffees was unlawful; for that the fee simple in the use was lawfully transferred, and the right of the feoffees bound by the statute of 1 Rich. 3d. Therefore, by their entry, the feoffees could not have their former estate; that is to say, the fee simple. This opinion was sent into chancery by those judges.

Dyer 329. b.
330. a. An. 15
& 16 Eliza.
Vide alio Dyer
58. a.

This last case is the only one of moment on that side of the question, and Hobart^a speaking of it, calls it "a strange case." We will now consider the cases on the other part. In the beginning of the reign of Henry the seventh^b, we find it expressly laid down, that if cestuique use in tail, or cestuique use for life, makes a feoffment in fee, then this feoffment passes the use only during the feoffee's life, and is consequently no forfeiture: for after the feoffor's death, the feoffees may re-enter to re-vest the uses. This case

^a Hob. 256.

^b Bro. tit. feoff.
al. uses. pl. 24.
⁴ Henry 7. 18.

is prior in point of date to either of those, since from Dyer; and this practice and opinion it seems, was regularly adopted until the latter part of the reign of Henry the eighth: for Brooke tells us, during that monarch's reign there was no occasion for entry or claim, within the five years, to avoid a fine levied by certiorate use for life, with proclamations; for the fine was a mere grant of his estate, and no forfeiture. This was that neither a forfeiture nor fine by certiorate use for life amounted to a forfeiture of his estate, must be accounted for on these grounds — that by the forfeiture or fine only a part was taken from the grantee, whilst the legal estate remained in the feoffees; or that the whole legal estate passed to the grantee during his life, whilst the remainder continued in the feoffees, or lastly, that by the fine or forfeiture of the whole was in fee passed to the grantee, and the whole legal estate was retained to him during the life of certiorate use, after which period the feoffees had a right to enter, and thereby to revest the legal estate in themselves, and to revive the forfeiture. This last reason seems, however, the most awkwardly urged one. And indeed it is more consistent with the spirit of the law, that the feoffees should be construed to have had a power to enter to revert the use to the certiorate use, than that I apprehend, that there was not a construction had been made, that the feoffees in remainder could not enter against the forfeiture of certiorate use, which would render the forfeiture in remainder in a most worse situation

situation than that of a remainder man in possession. This conjecture, I think, is warranted by a case in Moore's reports^d, where a man made a feoffment in fee to the use of one in tail, remainder to the right heirs of tenant in tail in fee. Tenant in tail made a feoffment in fee: the feoffee died, and then the cestuique use in tail died. The feoffees entered to revive the first uses; and upon a doubt arising in the breast of the judges, whether this entry by the feoffees was lawful, they clearly held, that the heir of cestuique use in tail had no remedy, but by the entry of the feoffees. Now we see by this case, that the heir in tail of cestuique use had not the remedy by a *formedon*, which is allowed to the heir in tail of a tenant in possession: Therefore it would be hard to take from him that remedy (by entry of the feoffees) which alone was afforded him.

But Delamere's case seems to have settled this point with respect to the right of entry of the feoffees. So far as it relates to the present question, it was thus: R. D. in the 13 H. 8. enfeoffed T. S. and others in fee to the use of himself and his wife, and the heirs of their two bodies; and in default of such issue remainder to R. D. in tail; remainders over. R. D. in the 26th H. 8. enfeoffed W. D. in fee; afterwards R. D. died, and the heir of the surviving feoffee entered to revive the antient uses. And upon solemn argument, it was held that the entry of the feoffees was lawful. It was said in this case, that by the feoffment of R. D. the fee simple in the lands passed, but that after the death

^d Moore, 38. 39.
pl. 125.

Plowd. 348 to
353. 10 Edm.

Plowd. 351.

death of the feoffor the feoffees might re-enter to revive the antient uses; but that although this right of entry remained in the feoffees, yet until their regrefs the fee simple was out of them. This case then seems to clash with that cited from Dyer^e. But sir Edward Coke gives the preference to this, who says, that this was determined upon solemn argument; whereas that from Dyer was only the opinion of the judges, without any argument^f.

^e 15 & 16. Eliza.

^f 1 Co. 128. b.
129. a.

However, upon an attentive perusal of Delamere's case, I think it may be deemed consistent with that taken from Dyer; for when the counsel in Delamere's case said that the feoffees might enter after the feoffor's death, it was also observed that they might enter if there was no obstacle besides the feoffment^g; for the feoffment was good by the statute against all claiming any title or interest in the lands only to the use of the feoffor or his heirs. Now when the feoffor died, the feoffees did not claim to the use of the heirs of the feoffor, but to the wife of the feoffor; in which case the feoffees were neither restrained by the statute, nor the common law. Whereas, in the case from Dyer, the first feoffees certainly did claim to the use of the heir in tail of cestuique use. Therefore, by the statute the right of the feoffees was bound; and as they could not enter, the heir in tail had no remedy, according to the case in Moore^h. With this distinction then between the two cases, they both may well stand together, and may serve as authorities in such cases. Indeed, if we consider the words of the statute,

^g Plowd. 351.

^h Ante, 38.

tute, it does not appear, that they will admit of any other construction.

A feoffment then by cestuique use in tail, after the statute of Richard the first, appears to have had the same operation in barring the claims of the issue, as a fine would have had. I say, as a *fine* would have had, because, though it was at first doubted, whether it would have that effect, yet it was settled that a fine properly levied would completely bar the issue in tail of cestuique use; and also the entry of the feoffees, whilst they claimed to *the use of the issue*. But according to the doctrine in Delamere's case, neither the feoffment nor the fine would bar any remainder expectant on the determination of the estate tail; for whenever the tail ceased, I apprehend the feoffees had a right to enter to revive the antient uses; for then they would not claim to the use of the feoffor, or his heirs, but to the use of a stranger. I must here observe, that Gilbertⁱ, in his treatise on the law of uses and trusts, seems to have been in an error when he asserts, that a recovery suffered by a cestuique use in tail, did not, after the statute 1 Richard 3, bind the issue in tail. For though it was questioned^k in the 30th Henry 8. whether a recovery bound the heirs in tail of cestuique use, (and Hales indeed was of opinion that though the entry of the feoffees was tolled during the life of cestuique use in tail; yet after his death they were entitled to a writ of entry *ad terminum qui præterit in the post* :) nevertheless Brooke tells us, that in the reign of Edward the sixth, it was determined in the Court of Chancery, that
if

ⁱ Gilb. Fea. 32.

^k Bro. Tit. feoff. al. us. pl. 56. Tit. Rec. pl. 29. B. N. C. 147.

if a recovery was suffered, and cestuique use in tail vouched, it barred the issue in tail, and consequently all remainders over.

It follows from these observations, that if there had been a feoffment in fee after the statute Richard 3, and before 27 Henry 8. c. 10. made to the use of A. *for years*, remainder to B. in fee; if A. (the tenant for years) had made a feoffment in fee, it would not have created a forfeiture of his estate for years. But to apply this obsolete learning to the modern doctrine of uses and trusts, and to put a probable case: suppose A. leases for 1000 years to B. in *trust* for himself; or suppose A. is possessed of the legal, and absolute interest of a term of 1000 years, without paying rent, or subject to any conditions. A. assigns over his term to B. in trust for himself, and then makes a feoffment in fee. Does A. by this feoffment, according to the statute Richard 3. convey the legal estate of B, and create a forfeiture to him in reversion? Or does the legal estate still continue in B. and being so, not liable to any forfeiture by the alienation of the cestuique trust? This chiefly depends upon the question, whether a term of years, like this, comes within the statute of Richard the third: for if it does, then the legal estate of B. does certainly pass, according to Delamere's case, during the term: and as the legal interest in *the remainder* never was in B. and therefore no right of entry in him after the determination of the term, but the *legal* interest in the remainder being in the *remainder man*, the right of entry is in him also, and not in B; and therefore that right
of

of entry for a forfeiture may be legally exercised by him in remainder¹, when the legal interest in the term is conveyed for any longer duration, or greater estate, than the term itself consists of. Whereas, if it does not come within the statute of Richard 3, the *legal* estate must remain in B, after the feoffment: for there is no other statute, which authorises us to conclude, that the alienation of cestuique *trust* passes the legal estate of the trustee without the consent of the trustee. And if the legal estate is not out of the trustee, it remains the same as before the feoffment, and not enlarged thereby, and consequently the term is not forfeited. For the feoffment of the cestuique trust is the same as the feoffment of any indifferent stranger with respect to the forfeiture.

¹ Co. Litt. 252.
a. b. More 18, 2
pl. 64.

The statute of Richard 3. makes the feoffment of cestuique use good against the feoffee and his heirs, and against all others having or claiming any title or interest in the same, only to the use of the same feoffor, and his heirs. After the enacting of this statute the judges of the common law found it soon necessary to determine cases arising on this act. Such cases as were adjudged not to come within this act must have been left, as they were before, entirely in the jurisdiction of the chancery. Now, in the first place, they held that no person could come within this act, but one who was capable of being seised to the use of another. Among those, who were held not capable of being seised to the use of another, was a tenant for years. Thus it was held, that when a man made a lease for years,

rendering rent (or, as some say, without it) the lessee shall be seised to his own use; at least the law adjudges the situation of lessor and lessee, to be sufficient to create a use in the lessee. And this position, so far as it goes to raising a use in the lessee, provided there be *no express declaration* of it in the deed, is universally allowed by all writers^m. But a question may arise, whether an express declaration of a use to the donor or lessor, or to any other causes the lessee to stand seised to such declared use, thereby divesting it out of himself: for if it does, then a modern cestuique trust of a term certainly comes within the statute of 1 Richard 3. But I conceive that a lessee (technically speaking, and distinguishing a *use* from a *trust*) could not stand seised to the use of any other person than himself; and that all uses declared upon the deed were not cognizable by the courts as *uses*. This opinion, I think, is warranted by a case reported by Brookeⁿ, who expressly says, that a tenant for years cannot stand seised to any, but his own use, whether there be uses declared, or not: and that the case of a lessee was not within the 1 Richard 3. I am not at present aware of any case, which has contradicted this from Brooke. 'Tis true that Dyer^o says, that if a lease is made for years, *without expressing any use*, it shall be to the use of the lessee; by which perhaps he meant, that if any use had been expressed, it would have been to such expressed use. And Perkins^p says, that if a use be expressed in a lease, it shall be to such express use, if not against law. But as to what is said in Dyer, it

^m Vide Perk.
f. 536. Dyer,
10. a.

ⁿ Bro. feoff. al.
uses. pl. 49.
24 H. 8.
B. N. C. pl. 60.
136. 284.

^o Dyer, 10. a.

^p Perk. f. 537.

it is contradicted in another part of his reports by an exprefs determined case. And Perkins, I must observe, quotes no authority at all for his assertion. The case from Dyer was thus ^a:—A. being possessed of a term of ^a Dyer, 369. a. years, granted it to B. and C. and their assigns, to the use of himself and wife for life : and it was held that A. had no *use*, which he could grant over, according to the common law ; but only a *trust*, which by a rule of law is not grantable over ^r. In this case we see ^r 4. Inst. 83. the use exprefsly reserved to A, and upon A's granting his use and *interest* to another, the judges held, upon the case being sent to them by the chancellor, that the grant was void. Now if this had been strictly speaking a *use*, the grant would *not* have been void. For I believe, that there is no part of our law so totally acceded to by legal authors as this, viz.—That a use is by the common law grantable, and transferable from one man to another ^s. Whereas, on the contrary, it is ^s Bro. seoff. al. equally agreed, that no trust or confidence uses, pl. 44. can by exprefs rules of law be transferred or B. N. C. 75. assigned ^t. For though a man may be willing Plowd. 350. to be a confidential trustee to one, yet it does Gilb. uses. 26. not follow that he would wish to be so to Ba. uses. 16. another. Therefore, when Gilbert ^v, in com- ^t 4 Inst. 83. menting upon the case cited from Dyer, says, ^v Gilb. uses. that though A. could not grant over his *trust*, 199. yet he might assign over the land itself, by virtue of the 1 Richard 3, it shews that he did not recollect that the case of a lessee for years was not within the said statute. Besides, it would be extremely absurd to imagine, that the statute would give that person *alone* a

D 2

power

power of aliening the land itself, who had no power given by the common law of even aliening his particular interest in it, viz. his trust. And I believe there is no case wherein the statute has been adjudged to countenance any disposition of the land itself by any one, who previous to the statute had no authority to grant his *fiduciary* interest, or trust, or who, according to the legal notion, had not a *use*, but only a confidential trust. Nay further, the statute does not extend to some persons, who have a use, and also power to alien that use by the common law. Thus, if there be tenant for life, remainder for life, or in fee, now the remainder man may dispose of the *use*, but he cannot make a feoffment of the *land* ^w. Besides, the judges, in delivering their opinion on the case cited from Dyer, expressly said, that the grant of it was void, and not authorized by the *statutes of uses*; and the editor of Dyer's reports adds, *et de 1 Richard 3. §. 27 Henry 8.* as he says was determined in Ridley's case in the 35 Eliza. Here then we have an express case to the purpose. I must observe, that if a common lessee for years, grants or assigns over his *interest* in his term, this grant or assignment absolutely conveys away his whole term, and possession ^x— for both of them pass, because he is *interested in them*. Consequently therefore, though the *lessee* might transfer his term and possession by his grant of his *interest* therein, yet an indifferent stranger could not by such grant convey the term, because he is *not interested in it*. At the same time the stranger might disseise the lessee, and convey the *land* itself.

Upon

^w B. N. C. pl.
75. 25 H. 8.
Plowd. 350.

^x Co. Litt. 345.
b. 3. Co. 24. a.

Upon this ground, Gilbert said, it seemed to him in the principal case (for A. *there* had only granted his *interest* in the term) “ that “ if A. had assigned over the land itself, it “ would be good by the 1 Richard 3, but “ the words he used were not sufficient to “ pass the land, for he had no *interest* there- “ in.” But this remark itself tends to shew, that a cestuique trust of a term was not considered as a cestuique use under the statute: for, if he had been so considered, this very statute would have given him a sufficient *interest* in the land, by the assignment of which, the land itself would have passed. It is very certain, that if A. had been a cestuique use within the statute, his assignment of his *interest* would have passed the land. Consider the case of *cestuique use* before the statute, when feoffees in fee were seised to the use of cestuique use, or different cestuique uses; cestuique use had an *interest in the use*, which he might transfer, though he had no *legal interest* in the land itself. Sometimes, however, he used to get possession, and then make secret, and unknown feoffments, which deceived purchasers: for his feoffment was unlawful without the consent of the feoffees. Upon which account, the statute was enacted, which gave the cestuique use an *interest* in the *land* as well as the *use*: so that he might enter on the feoffees, and make a feoffment, and grant, good against the feoffees. Now the preamble of the statute, and the saving (of which more hereafter) tend to shew that the statute was only intended to extend to cestuique uses, where feoffees were seised *in fee*.

This

This too is explained by another part of the statute, which says, that the alienation of cestuique use shall be good against all persons claiming any interest or title only to the *use* (the statute, by the bye, does not mention the word *trust*) of cestuique use, or *his heirs*. Now this is not the case of trustees of a term, who are never seised to the use of the *heirs* of cestuique trust, although particularly mentioned^c. They are always, after the death of cestuique trust, trustees in that case for his executors. The statute then was only meant to extend to those who before its being enacted had an acknowledged *use*, which they might alien, and which was subject to many of the rules relating to the land itself; but it could never include those, who had only a trust, which was *not* alienable. Besides it is rather paradoxical, to think, that a man can *lawfully* grant lands, who has no *interest* in those lands. For, according to that principle, a disseisor, intruder, &c. might make a lawful conveyance. For these reasons, I think it pretty evident that the trust of a term does not come within the statute of 1 Richard 3. And I shall confirm this opinion by citing the authority of the lord Coke^d, who, speaking of a *trust*, says, that it cannot be *assigned*: for it is in the nature of a *chose in action*, for *cestuique trust* has no power over the lands, but can only seek his remedy in chancery. Therefore he is unlike a *cestuique use*, who might have *possessio fratris* of his use, or be sworn upon a jury in respect thereof. But *cestuique trust* has no power over the lands by 1 Richard 3. I must observe, that my lord Coke,

^c 2 Freem. 131,

³ Cha. rep. 36.

^d 4 Inst. 85.

Coke, in giving an instance of such a *trust*, as he was noticing, actually cites the case which I have taken from Dyer.

If these authorities did not clearly prove that a *use* could not be limited on a term of years, it might be *objected* that though Brooke tells us in two places^e, that a lessee cannot stand seised to the use of the lessor, though the use is expressly declared to him, it being contrary to reason that the lessee would give the lessor a recompence, in order to stand seised to the use of such lessor; yet Brooke did not mean to assert, that a lessee could not stand seised to the use of a *third person*. But to that objection, it might be answered, that the same inconsistency would appear as well in the one case as the other: for if the lessee could stand seised to the use of a stranger, he certainly might to the lessor. And Brooke in another place^f says, that if feoffees to uses make a *lease* to one who has notice of the former uses (either with or without rendering rent) yet the lessee shall be seised to his own use. Now this case directly shews us, that the lessee cannot stand seised to the use of another, viz. to the former cestuique use, who as to him is a stranger: and it points out the true distinction between the case of a lease or term of years, and a feoffment in fee: for if the feoffees (instead of making a lease) had enfeoffed a purchaser in fee for a valuable consideration, but *with notice* of the former uses, such purchaser would have stood seised to the prior uses, notwithstanding any express

^e B. N. C. 60.
284. 36. H. 8.
Vide Dy. 8. b.

^f B. N. C. 136.
30 H. 8.

expres declaration of the uses on the feoffment.

Upon the whole, we may venture to lay it down as a rule, that no *use* could be limited on a term of years; but that a *trust* could be limited on such term of years, which trust, however, was not assignable by the common law, nor was it within the statute of 1 Rich.

1. But why such a construction was originally made with regard to terms of years, at the same time that *uses* were allowed to be limited out of the estate and seisin of the feoffees in fee, is perhaps at this time difficult to determine. We will, however, take a review of uses and trusts from the reign of Edw. the 3d, and endeavour to point out some further distinctions between them, and also the reasons of such distinctions, as taken previous to the statute of 1 Rich. 3.

8 Vide 2 R. 2.
c. 3. feff. 2.
also 3 H. 7.
c. 4. by which
latter statute
all deeds of
gifts of goods,
in trust for the
persons who
made the same,
are declared
void.

By the statute 50 Edw. 3. c. 6⁸. it appears, that debtors, in order to defeat the claims of their creditors, made secret conveyances upon special trusts; upon which account the statute authorized an execution to be taken on the lands themselves. This statute, as was before observed, is the first that alludes to conveyances in *trust*: and when it was passed, *uses* were not known. For by a conveyance at that time of the land only, the right to the profits (which right to the profits, and the lands, were afterwards divided into the *use* and possession) also passed: and this *special* trust placed in the grantee, when the absolute estate in the lands and profits were conveyed to him, was not such a
trust

trust as comes within the definition or meaning of a *use*. That the *trust* complained of in the statute 50 Ed. 3. was not properly a *use*, appears from several reasons. That very statute made the lands liable to the execution of the creditors of cestuique trust in the hands of the trustee; but the lands of *cestuique use* were not liable to executions in the hands of the feoffees, neither was the use itself extendable for the debt of cestuique use, as appears by a subsequent statute^b. So a *use* is not held to be of a collusive or covinous nature; and it is distinguished from a trust by being *permanent* and *general*. Whereas a *trust* is of a special and *transitory* quality—which *special* and *transitory* trust may be either *unlawful*, as a conveyance to deceive creditors, or it may be *lawful*, as a conveyance to the intent to suffer a recovery, &c.¹ So also the declaration of the *use* clearly made an alteration in the estate in the land, by dividing it into an estate in *possession*, and an estate in *use*. By declaring the use from the feoffees, they had only a *legal* estate, or mere seisin left in them to serve the uses. Nor could the feoffees injure cestuique use, but by an absolute sale to a bona fide purchaser without notice^m. Cestuique use, on the other hand, had many advantages. Thus he could compel the feoffees to execute estates before the statute 1 Rich. 3; he could alien the useⁿ, and also had the power of devising^o it, though the lands themselves were not subject to testamentary dispositions. There was also a *possessio fratris* of a use^p. But with respect to *trusts*, no declaration of them could

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^b 19 H. 7. c. 19.

¹ Ba. uses. 8. 9.
vide supra, 14
to 18.

^m Plowd. 351.

ⁿ B. N. C. 75.
^o 1 Co. 121. b.
123. b.

^p 5 Edw. 4. 7. b.

at law alter the property of the grantee⁹. It was not, as we have already seen, acknowledged to be assignable by the common law: and of course it was not devisable. These then were the evident distinction between *uses* and *trusts* before the statute of uses. It must be observed, that in raising this *use* out of the possession or seisin of the feoffees, it was held, that if a feoffment was made in fee without any consideration, or declaration of the use, the use resulted back to the feoffor^r: but if there was a consideration expressed in the deed (though ever so inconsiderable) it would then go to the feoffee without any declaration^s: and yet if there was a consideration expressed in the deed, still upon the mutual consent of the parties, the use might be declared to any indifferent person^t. These constructions, with respect to feoffments in fee, have been taken in order that the manifest intention of the parties may be observed: for, as there is no implied consideration between the feoffor and feoffee upon such feoffments *in fee*, the use should be directed by those circumstances, which most plainly indicate the meaning of the parties. But when the courts came to judge concerning uses limited on terms of years, they held that if a lease was made to one for years to the use of another, or if a lessee assigned over his term to the use of a third person, or himself, the limitation over of the use was void as a *use*, and was merely a *trust* in equity. Perhaps we may assign two reasons for this construction. In the first place, a lease for years was but a chattel: and the *personal* and

⁹ Dyer 49. b.

^r Perk. f. 533.

^s Shep. t. 496.

^t Ander. 37.
Dyer 147. a.
2 Co. 76. a.

and *transitory* nature of chattels might have occasioned the judges to form this opinion. Chattels probably were not considered to be of sufficient consequence to have an established division of property made with respect to them, viz. a property in the possession, and in the use. Therefore, if goods were given to A. to the use of B. the property of the goods was altogether in A: nor was that property altered by the declaration of the use to B.^v Now this rule, being once introduced with respect to personal chattels, might have been extended upon similar principles to real chattels, as leases for years. But the second and better reason seems to be this. If a man made a lease for years, the lessee was by the more received opinion compellable to do fealty to the lessor^w, or to render rent: either of which was considered as a sufficient consideration to raise, and as tantamount to an express declaration of, the use to the lessee. Consequently, the use being declared to the lessee by a necessary construction of law, no other use could be declared by the lessor, to whom both the fealty and rent were reserved. The case then of a lease for years differs from that of a feoffment *in fee*. Though the feoffees give a consideration, which alone (without any declaration) would be sufficient to raise and carry the use to them; yet as this consideration is wholly given by the parties themselves, and not imposed upon them by a necessary implication of law, the parties may surely declare to what uses that consideration was originally given. But it may here be asked, why fealty does not create

^v Dyer 49. b.
² Vent. 310.

^w Co. Litt. 67.
b. Note 2.
Litt. f. 132.

create a consideration to carry the use absolutely to the *feoffee*, as it does to the *lessee*? To that it may be answered, that a lessee is compellable to do fealty to the *lessor himself*; in which case the consideration of fealty is immediately between the lessor and the lessee. But a feoffee *in fee*, since the statute of *quia emptores terrarum*, holds de *capitali domino*, and not of the *feoffor*. So that there is no consideration of fealty directly between the feoffor and feoffee; in which case there can be no inconsistency in construing the use to result to the feoffor, when there is neither a consideration nor declaration to carry it to the feoffee. I must here observe, that when Perkins* speaks of the consequence of a feoffment in fee to uses *before* the statute of *quia emptores terrarum* (viz. that if a man had *then* enfeoffed another in fee without any consideration, the use would have been to *the feoffee*, because of the consideration of fealty between the feoffor and feoffee): when he thus speaks, I say, he puts a case merely for an example; which case indeed proves the justice of my observation concerning the effects of the consideration of fealty; but it is a case which could never have happened. For there is not the most distant trace of authority to lead us into a belief, that feoffments to *uses* were in practice *before* that statute, which was enacted in the reign of Edward the first†. But on the contrary, we have every reason to conclude that *uses* were not known among us till the beginning of the reign of Richard the second, or until the latter part of Edward the third's reign.

*Perk. f. 529.

†18 E. 1. c. 1. 2.

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Perkins^a (who wrote before the statute of uses) is, I apprehend, clearly wrong, when he tells us, that though 'a *tenant in tail*, or *tenant for life*, without any declaration of the use by the donor or lessor, would be seised to their own use: yet if *a use be declared* on the grant, they would stand seised to such declared use. For it appears to me, that there is scarce any rule of law more universally acceded to by writers on this head than this, viz. that *before* the statute of uses 27 H. 8. c. 10. a tenant in tail could *not* stand seised to any other use than his own^a. For this construction, with respect to a tenant in tail, was made not only for the same reasons as were given concerning a lessee for years (for the statute *quia emptores* only speaks of alienations *in fee*) but also on account of the statute of Westminster, 2. c. 1. *de donis conditionalibus*: for if a tenant in tail, since that statute, was allowed to execute an estate to cestuique use, it would prejudice his issue, and would give him a power repugnant to the nature of an estate tail. Indeed, a tenant in tail is expressly noticed in the saving of the statute 1 Rich. 3. So likewise a *lessee for life* could not, on account of the fealty due to the lessor, stand seised to the use of another person^b: for the consideration of fealty was thought sufficient for both the possession and the use. But whether there is any change in the law with respect to tenants in tail, and tenants for life, *since* the statute 27 H. 8. c. 10. will be the subject of a future investigation. It is however, observable, that as uses were not suffered

^a Perk. c. 534.
535-537.

^a Bro. tit. feoff.
al. uses, pl. 40.
B. N. C. 60.
2 Co. 78. a.
Co. Litt. 19. b.
Plowd. 555.
2 Roll. ab. 780.
Jenk. Cent. 195.
Moore 848.

^b Bro. feoff.
al. uses, pl. 40.
B. N. C. 60.
2 Roll. ab. 781.

ferred to be limited out of the estate of a tenant in tail, tenant for life, or lessee for years, it must follow that they were only permitted to arise out of the *seisin* and estate of feoffees *in fee*; which circumstance accords with the above offered idea of their *generality* and *permanency*.

I trust that I have now sufficiently proved, that a lessee for years, or assignee of a term, cannot stand seized to a use, so as the cestuique use may have a power over the *land* by the statute 1 Rich. 3; but that all uses declared on such leases or assignments are mere *trusts* in equity, and by the common law not assignable. As a term of years does not come within the statute 1 Rich. 3. so neither is it within the statute 27 H. 8. c. 10. Indeed, the case of a term of years seems to be a *casus omisus* in our statute laws concerning *uses*; whereas *uses* themselves have undergone several alterations. After the statute 27 H. 8. c. 10. which was intended to destroy the estate of the feoffees by annexing the possession to the use, a kind of *permanent trust* or secondary use, declared out of the estate of *cestuique use*, was introduced in the room of *uses*. *Trusts* then, at this day, whether *special* or *permanent*, are reduced to a regular and equitable system, differing however from that adopted with respect to *uses*. But as trusts of terms of years seem to have in some respects a construction, peculiar to themselves, and as they do not owe their origin to the statute of *uses* (like these *permanent trusts of inheritance*) we will in this place

place consider their legal and equitable qualities.

When cestuique trust, after the statute 1 Rich. 3. found that he was driven out of the courts of law, which declared that trusts were not cognizable there, he was obliged to seek relief in the courts of equity. Chancery very properly held, that cestuique trust should have the relief he sought for; for a *trust* ought in conscience as strictly to be performed as a *use*. Indeed the courts of equity, in taking cognizance of these trusts, have put them upon a plan far more equitable than the doctrine of uses. We will first consider the power of *alienation* of cestuique trust of a term.

It appears, from the very nature of a trust, that cestuique trust has no power whatever over the land: and that notwithstanding any alienation of the land by him alone; the *legal* estate must continue in the trustees. Upon this principle it is, that no conveyance or alienation by cestuique trust can work a forfeiture of the legal estate of the trustees c. Vide 2 Freem. 213, 214
The remainder-man expectant on a term of years, or the reversioner, cannot enter for a forfeiture, unless the particular estate for years is enlarged by the act or alienation of the particular tenant. But if cestuique trust for years makes a feoffment in fee, as this does not pass, or enlarge the legal estate of the trustees, of course it cannot work a forfeiture of it. The legal estate still continues in the trustees, notwithstanding the tortious act of cestuique trust. Wherefore it has of late frequently been held, that, if *cestuique trust*
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for life levies a fine in fee, it is not a forfeiture of his life estate^d; for the legal estate continues in the trustees; and it is the office of the trustees to protect the estate of cestuique trust. Indeed, it has been said to be a rule in chancery, that cestuique trust shall have the *benefit* of the *trust* to all intents, but to *forfeit*^e. But though cestuique trust has no power of the land, whilst the legal estate remains in the trustees, yet he always may, in imitation of the doctrine of uses, by a bill in chancery, compel the trustees to make a conveyance: and indeed, in most cases, it would be prudent for trustees to convey without waiting for a decree of the court, for fear of being burthened with the costs of

^f Vide 2 Vern. suit^f.

346.

^g *Rooke v. Staples*,
21 & 22 Eliz.
Cary's rep. 76.
ed. 1650.

But notwithstanding that the legal estate of the term is in the trustees, yet it remains in them solely for the benefit of cestuique trust; and it rarely happens, that the *alienation* of the trustees can materially injure the cestuique trust. This is a doctrine long since established; and is particularly explained by a case reported by Sir George Cary^g. Cestuique trust for years filed a bill in chancery to be relieved against the alienation of his trustees; and it was decreed by the court, that cestuique trust should enjoy the term against the trustees, and against all claiming under them, *with notice* of the trust; but if the term was sold *without notice*, that then the trustees should *pay cestuique trust as much as amounted to the value of the term*. The doctrine contained in the latter part of this case is confirmed by the case of *Jevon v. Bush*^h.

^h 1 Vern. 342.

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The Lord Bellamont, in 1647, when he was about to leave England, having been in arms for king Charles the first, and being, after that monarch was beheaded, much oppressed by the usurping powers, lent a sum of money to one, for which he took a recognizance in the name of a trustee in trust for his daughter. The Lord Bellamont died, and the cognizor (who was seised of lands at the time the recognizance was taken) being about to sell his estates, the purchaser prevailed upon the trustee to acknowledge satisfaction on the recognizance, which the trustee did accordingly. Upon a bill by cestuique trust to be relieved against this breach of trust, the lord-chancellor decreed the trustee to pay the principal money and damages, not exceeding the penalty of the recognizance. Note the difference between notice in this case, and in the preceding one.

But notwithstanding this equitable construction respecting the alienations of the trustees, and cestuique trust, yet still no act of cestuique trust *alone* can divest the legal estate out of the trustees. Therefore, if it should so happen, that cestuique trust for years should alien his interest in the term, and before the grantee of cestuique trust could obtain a conveyance of the legal estate from the trustees, the trustees should grant the term itself to a purchaser for a valuable consideration, and without notice; in this case the grantee of the trustees would hold against the grantee of cestuique trust; for the former has not only a *legal* title to the term, but also an *equitable* one, equal at least to that of

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the grantee of cestuique trust : and it is a rule of equity, that where the equity of the parties is equal, he who has the *law* on his side shall prevailⁱ. This doctrine, with respect to terms of years, appears by the case of *Rooke v. Staples*, cited before, and by that of *Baker v. Sir W. Lee*, as reported by Jones^k ; which latter case does not seem necessary to be stated here. I must observe, that the case of the *Attorney General v. Lord Gare*^l does not contradict this rule of equity. *In that* a corporation made a long lease in trust for themselves : but *continuing in possession*, they made leases, and actually sold part of the land without the concurrence of the trustees. Afterwards the administrator of the surviving trustee also made a lease. It was decreed in chancery, that the leases made by the corporation should be established in preference to that made by the administrator of the trustee. But in order to make this decree, the court held, from the particular circumstances of the case, that the original lease itself, made by the corporation in trust for themselves, should not be established : consequently, if *that* was not established, the legal estate in the land must have continued in the corporation at the time the leases were made. Besides, it was particularly provided in the original lease, that the trustees should not make leases without the consent of the corporation.

It seems, that if cestuique trust of a term commits felony, this is a forfeiture of the trust^a. He shall likewise forfeit it upon an outlawry in a personal action. This seems rather

ⁱ Vide note 1.
Hargr. Co.
Litt. 290. b.
under folio
297. b.
^k Wm Jones,
213. .

^l Barn. Cha.
Rep. 145.

^a 3 Cha. Rep. 36.
Nelson's
Rep. 133.

rather hard; for by the common *use* did not forfeit his *use* for felony; and this is the more singular been held, that if a trustee for tainted of treason, the king shall lands divested of the trust^b: if lands and trust are liable to be forfeited by the act of the trustee and cestuique trust, which renders a trust term in this respect less eligible than a legal one. However, a term attendant on the inheritance is not forfeitable for felony, though it is, like the trust of the land itself, forfeitable for treason^c. c Hard. 489.

The legislature, and the courts of equity, have endeavoured, in many respects, to render the estate of cestuique trust upon the same footing as a legal estate. This construction has particularly taken place with respect to creditors. By the express words of the statute of frauds^d, trust estates (under^d 29 Car. 2. which words are included trusts of terms)^{c. 3.} are liable to executions on judgments, statutes, and recognizances. Now, by the legal course of construction, the lands were *also* liable to the debts of the trustee: but here the courts of equity interfered, and held that though the confession of judgment by a trustee might be considered as a lien upon his trust estate *at law*, yet in equity it would not affect it; for the estate itself in equity would not belong to the trustee, but to cestuique trust^e. So too though by the common law uses were not held to be assets to the heir or executor^f, yet the courts of equity, since the introduction of trusts, have adopted a more just and liberal system, and repeatedly

1 P. W. 343.
3 Rep. Cha. 37.
Nelson's Rep.
134.

1 3 P. W. 343.

1 2 Vern. 764.

1 2 Vern. 490.

1 Hard. 496.

1 2 Vern. 248.

1 Hard. 489.

3 Rep. Cha. 37.

Nel. Rep. 134.

3 P. W. 329,

330.

1 3 P. W. 342.

held, that the trust of a term is legal assets in the hands of the executor ^s. Therefore, if a term be limited to B. in trust for A. this on the death of A. will be legal assets; for in this case the right to the thing is plain, and if the trustee contests it, he must *prima facie* do it on peril of paying costs ^h. But the creditor cannot come upon these assets without the assistance of a court of equity ^k. It appears, however, from the case of Fletcher and Udley ^l, that if A. *purchases* a term in the name of B. in trust for himself for life, remainder to his wife, that this term is not assets to pay creditors; and principally for these reasons, because the term itself never was in him; and because that could not be assets, which a man never had. But this case (supposing it to be law) can only be an exception to the present general rule of equity. But here we must make a distinction with respect to a term attendant on the inheritance; for as a trust in fee, since the statute of frauds (though held to be contrary before that statute ^m) is assets in the hands of the heir ⁿ; so the term, which follows the inheritance, and goes to the heir, must, instead of being assets in the hands of the executor, be assets in the hands of the heir ^o. So again, if a bond is taken in the name of A. in trust for B; upon the death of B. it will go in the course of administration ^p. These determinations of the courts of equity were evidently intended for the benefit of the creditor; and as they were by their institution authorized to correct the strictness of the common

mon law, they extended their equitable construction still further; and, in opposition to the maxims of the common law, they held, that a trust was grantable over; and not only a trust *in esse*, but even the *possibility of a trust*¹: maintaining, that where any person had the possibility of a trust in remainder, he had full power in equity to declare and make a disposition of such trust².

However, in some cases the legal notion of trusts has continued among us; for though when a man marries a woman, who has a term of years, and the wife dies, the term survives to him; yet it has been held, that the trust of a term of the *feme's* will not survive to the husband, but go to the wife's executor³: though this indeed has been doubted⁴. But it seems now to be understood by the better opinion, that the husband may dispose of the trust of the term after marriage, and such disposition will be good in equity, the same as if she had the term itself in her⁵.

With respect to the limitation of the trust of a term, it is now settled, that it must have the same construction as the legal estate would have had⁶. Therefore, if the trust of a term is devised to A. and the heirs of his body, remainder to B. this remainder to B. is void; and notwithstanding the limitation to the heirs of the body of A. the whole of the term vests in A: for it is agreed, that the words of a will, when used in regard to a freehold, will give an *express* freehold estate tail; there the same words applied to a term will pass the whole interest in such term⁷. There-

¹ Rep. Cha. 30.² Ca. Cha. 8.³ 3 & 14 Car. 2.⁴ Co. Litt.⁵ 351. a.
⁶ Vide Allen.⁷ 15.⁸ 3 Rep. Cha.
223, 224.⁹ 3 P. W. 259.¹⁰ 2 Vesey, 655.¹¹ 3 P. W. 259.

Therefore, if the trust of a term is limited to A. for life, and immediately from and after the death of A. to the heirs of the body of A. lawfully to be begotten, remainder over, the whole term vests in A.^a But if the words of a devise would, in case of a freehold, only pass an estate tail by implication, then it seems the remainder is good.^a Thus a devise to A. of a term, and if A. died *leaving no issue*, then to B. the remainder to B. is good, and A. takes only an estate for life^b.—We will now return to the statute of Richard the first.

^a 2 Vesey, 233.
Theobridge v.
Kilburne.

^a 3 P. W. 259.

^b 1 P. W. 663.
666.

^c Perk. f. 18.

Perkins says^c, “If cestuique use be of a reversion, he may grant the same as well as if he were in possession, and that by the statute of Richard the third, made in the first year of his reign, cap. 1.” But Perkins, in this instance, as in many others, cites no authority for his assertion: and it is directly contradicted by the decision in Delamer’s case^e; for there it was determined, that the statute only intended to give the *present* possessor of the use a power of alienation, and did not extend to those in remainder or reversion; therefore a remainder man or reversioner might alien the *use* (as they might have done before the statute) yet they could not alien the land itself^f.

^e Plowd. 348.

^f Bro. tit. feoff.
al. uses pl. 44.
B. N. C. 75.

^g Plowd. 351.

So too the statute was adjudged only to include those who had a present use *in esse*, and not those who had only a naked right to a use^g. Therefore, if A. was seised to the use of B. and enfeoffed C; B. had no way of regaining his use, but by the entry of the feoffee; and until the use was revested in B. had

had no power of aliening it by the statute of Richard the third ^b.

It was held, that if after this statute a ^a feoffee to uses had been disseised, and cestuique use had released to the disseisor; or if the disseisor had enfeoffed a stranger; in either case the entry of the feoffee was completely barred ⁱ.

^b Gilb. uses, 27, 28.

ⁱ Plowd. 361, 352.

A cestuique use by this statute might make a lease for years rendering rent, for which he might bring an action, but could not avow ^k.

^k 27 H. 8. 13. Bro. tit. feoff. al. uses, pl. 6.

And it has been held, that a reservation of rent by cestuique use would carry it to the heir, without being particularly named for that purpose ^l. However, though cestuique

^l 2 H. 7. 25. Bro. feoff. al. uses, pl. 18.

use was enabled to make a lease for life or years, yet the reversion was still in the feoffees, who might have brought an action notwithstanding the want of privity ^m. The

^m 5 H. 7. 5. b.

statute was made for the advantage of the lessee or feoffee, and not for the advantage of the cestuique use or feoffor. Therefore, if cestuique use had entered, and afterwards made a feoffment, still the feoffment did not purge the tort, but the feoffees might have had their assize ⁿ. This statute must also be

ⁿ 5 H. 7. 5. b.

understood only of alienations during the life of cestuique use; therefore it has often been held, that a cestuique use could not devise the land by the equity of 1st Rich. 3d. however he might have been able to devise the use by the common law ^o. This construction

^o Dyer 74, a. 143. a.

of the statute was for very obvious reasons. Though the statute established the legal conveyances of cestuique use, yet neither the words or the equity of it could have been

adjudged

adjudged to countenance his tortious acts. For lands from the time of Richard the third, to the 32 Hen. 8. were not devisable.

This statute of Rich. 3. was said to have introduced a new species of feoffments, which differed from the feoffment by the common law in many respects. This difference is explained in the Lord Sheffield's case^P: it is there said, " Feoffments are the antient conveyances of the land; but feoffments, according to the 1st Rich. 3d, are upstarts, and have not had continuance above 150 years. In case of feoffments at common law the feoffor ought to be seised of the lands at the time of the feoffment; but if a feoffment be according to the statute 1st Rich. 3d, in such case the feoffor needeth not be in possession. Feoffments at the common law give away both the estates and rights; but feoffments by the statute 1st Rich. 3d, give the estates, but not the rights. In case of feoffment at the common law, the feoffee is in the *per*, viz. by the feoffor; but in case of feoffments by the statute of 1st Rich. 3d, the feoffees are in the *post*, viz. by the first feoffees. 14 H. 8. 10. Brudnel says, *that a feoffment by cestuique use by the statute 1st Rich. 3d, ' is like to fire out of a flint; so as all the fire which cometh out of the flint will not fasten upon any thing but tinder or gunpowder.'* In another place: ' Cestuique use makes the feoffment as servant to the feoffees, and if not as servant to the feoffees, yet at least

^P Godb. 318.
² Roll. Rep.
 333.
 21 Jac. 1.

“least as servant to the statute of 1st Rich. 3d.”

It has likewise been held, that if a lord or a grantee of a rent-charge had been also cestuique use of the land, and after the statute of 1st Rich. 3d. cestuique use had made a feoffment in fee of the land, though the land passed from the feoffees, and his feoffment was warranted by the statute, yet the seignior or rent-charge was extinct by his feoffment ^{9. 1 Co. Litt. 32. a.} And lastly, it was held, that cestuique use was ^{Gilb. uses, 31.} bound in a statute merchant, statute staple, and by elegit, by the words of the statute 1 Rich. 3 ^{r.}

I trust I stand excused for this long digression on the exposition of the statute of 1st Rich. 3d. Many of the laws indeed relating to this statute are now rendered obsolete, and indeed unnecessary, by the statute of 27 H. 8. c. 10; but though at this day, strictly speaking, they are useless, because the statute itself is now of no utility, yet a knowledge of them must lead to a better understanding of the present law of trusts, and at any rate must afford satisfaction to the curious. What has been said relating to terms of years is absolutely proper to be known; for they, as has been said, are not comprized within the statute of 27 H. 8. Indeed I have been the more particular in the exposition of the statute 1 Rich. 3. especially as most legal writers have made very few, if any observations upon it. The statute 27 H. 8. c. 10. seems to have engrossed their chief attention. ^{7 H. 7. 6. Bro. feoff. al. uses, pl. 25.}

But

But to proceed with our account of statutes concerning uses: Richard the third, when Duke of Gloucester, had frequently been
 * 2 Comm. 332. made a feoffee to uses¹. Now as the king could not be seised to a use as the law then stood, and stands to this day², upon the assumption of the crown Richard would have held the lands discharged of the uses. There-
 1 Infra.
 * 2 Comm. 332. fore, as Sir William Blackstone observes³, to obviate so notorious an injustice, an act of parliament was immediately passed, which ordained, that where he had been so enfeoffed jointly with other persons, the land should vest in the other feoffees, as if he had never been named; and that where he stood solely enfeoffed, the estate itself should vest in cestuique use, in like manner as he had the use.

The very first act of parliament, which passed in the succeeding king's reign, was
 * 1 H. 7. c. 1. relating to uses⁴. For the statute 1 Hen. 7. made a *formedon* maintainable against the per-
 7 1 R. 2. c. 9.
 4 H. 4. c. 7.
 11 H. 6. c. 3.
 11 H. 6. c. 3.
 ners of the profits of lands enfeoffed to uses. It also allowed the tenant in the same action to have *aid, prayer, voucher*, and other advantages; that the tenant should also have his *age*, and other advantages and recoveries against the perners of the profits, and their feoffees.

By this statute we perceive, that the preceding acts⁵, which gave actions against the perners, did not extend to a *formedon*.

This statute also (which only gave a *formedon* by express name against *cestuique use*) was construed to extend to a *scire facias* to
 * 1 Co. 131. b. execute an estate tail in remainder by equity⁶.
 But

But in the construction of this act it was held in a case, where a *scire facias* was brought against the pignor of the profits, that the pignor should not vouch in a *scire facias*; for the act should be intended to mean such actions in which he might vouch. And the words of the act did not alter the law of vouchers, and give to the pignor any new voucher ^a.

^a 11 Co. 62. b.

Among the inconveniences, which attended the introduction of uses, it was found that lords lost the benefit of wardship, &c. therefore, by a statute ^b made in the same king's reign, it was provided, that the heir of cestuique use holding his lands by knight service within age should be in ward; and of full age should pay relief. On the contrary, for the benefit of the heir of cestuique use, the same statute provided, that he should have an action of waste against his guardian committing waste.

^b 4 H. 7. c. 17.

As this statute only named the tenure of knight service, it was held that it did not extend to lands held in soccage ^c.

^c Jenk. Cent.

The next statute, which was made relative to uses, seems to have taken away from cestuique use a very great privilege, viz. that of having his lands secured from the processes of law respecting executions. By the 19 H. 7 ^d, the lands of cestuique use shall be put into execution for his debt due by judgment. The lands of cestuique use were also made liable to satisfy the chief lord of his relief, heriot, and other duties. Cestuique use also was allowed to have the same advantages as he might have done, if he had been tenant of the

^d 190.
Dyer, 174. b.
B. N. C. 15.

^a 19 H. 7. c. 15.
Vide supra 53.

the

the land. And lastly, cestuique use being a bondman, his lands were seizable by the lord.

We have before seen, by the statute of 15 Rich. 2. c. 5. that lands conveyed to the use of religious houses, or bodies corporate, were amortized by licence from the crown. But that statute, it was held, did not extend to conveyances made in trust to the use of parish churches, chapels, churchwardens, companies, fraternities, &c. erected by *common assent* without any *corporation*; or in other words, to the use of companies incorporate. Now these alienations were as prejudicial to the lords as alienations in mortmain: for they thereby lost their wards, heriots, reliefs, &c.^e To remedy this mischief was the statute of 23 Henry 8. made^f. It recites,

“ That by reason of feoffments made of trust
 “ of manors, &c. to the use of parish
 “ churches, chapels, churchwardens, guilds,
 “ fraternities, commonalties, companies, or
 “ brotherhoods, erected or made of devotion,
 “ or by *common assent* of the people, *without*
 “ *any corporation*, and to the uses and intents
 “ to have obits perpetual, or any continual
 “ service of a priest for ever, &c. or to any
 “ other like uses and intents, there groweth
 “ to the king our sovereign lord, and to
 “ other lords and subjects of the realm, the
 “ same like losses and inconveniences, and is
 “ as much prejudicial to them, as doth and is
 “ in case where lands are aliened in mort-
 “ main: Be it therefore enacted, That all and
 “ every such uses, intents, and purposes, of
 “ what name, nature or quality the same
 “ shall be called, &c. shall be utterly void,
 “ and

^e 1 Co. 23 b.

^f 23 H. 8. c. 10.

“ and if any person in defraud of this statute
 “ do bind their heirs, &c. that then every
 “ such pain, penalty, craft, colour, and
 “ every other things, &c. shall be utterly
 “ void : And that this statute shall be always
 “ interpreted, &c. most beneficially to the
 “ destruction of such uses, &c. and of all
 “ other like uses and intents.”

I shall make a few observations on this statute.—In the first place, this act was made to prevent conveyances of land, &c. in trust for superstitious purposes, such as to pray for souls supposed to be in purgatory, and the like ; which superstitions and errors had crept into the Christian religion previous to the acknowledgment of Henry the 8th as the supreme head of the church of England &c. But 1 Co. 24. 2. it never intended to prevent alienations in trust for good and charitable purposes ; such as for finding of a preacher, maintenance of a school, relief and comfort of maimed soldiers, sustenance of poor people, reparation of churches, highways, bridges, causes, discharging of poor inhabitants of a town of common charges, for making a stock for poor labourers in husbandry, and poor apprentices, and for the marriage of poor virgins, and other like charitable uses^b.

2dly. This act does not make the conveyance itself void, nor gives the lord any title to enter for mortmain (like the 15 Richard 2. c. 5.): but only makes the use void. Therefore if the feoffment be *within* this statute, the feoffees (if no consideration is expressed) notwithstanding the declaration of uses shall stand seised to the use of the feoffor, and his heirs ; but if there be a consideration,
 ever

b 4 Co. 111. 2.
 1 Co. 26. 2.
 Hob. 136.

ever so small, expressed, then the feoffees will stand seised to their own use^l.

^l 1 Co. 24. 2.

3dly. All alienations of property to such charitable uses, as are not within this statute, in such manner, and of such species of property, as are not reckoned to come within the statute 27 H. 8. c. 10. for transferring uses into possession, such alienations or limitations of uses will not be executed by that last-mentioned statute, but remain as trusts to be performed in equity. Therefore if a term be given to trustees in trust for a charity, the legal interest in the term must remain in the trustees to answer the purposes of

^m 2 P. W. 398. the trust^k.

4thly. If a man *enfeoffs* two or three persons and their heirs in *trust*, and to the intent that the inhabitants of such a place should have a free school, or in trust to maintain poor children, &c.; this trust is not executed by the statute of 27 Henry 8. c. 10. for the lands must remain in the trustees to answer the purposes of the trusts, and therefore not a use executed by the said statute^l.

^l 2 Vern. 387.

One reason for this construction is, because a use cannot be limited to a parish, or any indefinite multitude, by a general name, it being no corporation, and without any public allowance^m.

^m 13 H. 7. 9. b.

But this limitation of the use is good as a *trust*. Another reason is, because it is a rule in chancery, according to several resolutions (which we have partly considered, and shall take notice of more fully hereafter) that where lands are given to trustees in trust to pay the profits over, the lands must continue in the trustees in order to perform the trust;

trust; and therefore the trusts are not uses within the statute of 27 Henry 8. but mere trusts in chancery ⁿ.

There are many other statutes, besides this, relating to the regulation of gifts to charitable uses; but as these statutes do not alter the construction here made, relative to the execution of the legal estate in the trustees, an exposition of them does not properly belong to this work. Those who wish to see further into this matter are particularly referred to the acts of 43 Elizabeth c. 4. and 9 George 2. c. 36. I shall only add here, that, generally speaking, the statutes of charitable uses supply all defects of assurances made to charities^o. Therefore a devise or appointment to a charitable use by tenant in tail, without previously levying a fine, or suffering a recovery ^r, or an appointment, or devise of copyhold lands by a will, without any surrender^a, will effectually in the first instance bar the entail, and in the second pass the copyhold. But it seems a nuncupative will of a rent was void even before the statute of frauds. By the 34 Elizabeth, an appointment of lands without deed was good; but since the statute of frauds, which as to that repeals the 34 Elizabeth, an appointment of lands to a charity by a will, not attested by three witnesses, is void ^r.

We have now taken a full survey of all the statutes relating to uses, previous to the statute of 27 Henry 8. c. 10. at least all those which I am aware of. These statutes all tend to consider *cestuique use* as the real owner of the land; and indeed he was made completely

ⁿ Vide 1 Eq. ab. 383. Vide supra 14 to 19, & infra.

^o 2 Vern. 755.

^r 1 P. W. 247, 248.

^a 2 Vern. 453.

454.

^r Vide 1 P. W. 248, 249.

completely so by the 27 Henry 8. c. 10. But before we enter into a discussion of that last statute, it will be necessary to consider the learning relating to uses before its being enacted; which will also explain to us the reasons, why the legislature interfered to correct uses: For, during the time of their separate existence, they had undergone many nice, and subtle refinements; and though we have already seen many acts passed to prevent any injustice, which these refinements naturally produced, yet none of them were found sufficiently effectual to destroy them completely. It must be remembered, that whatever is about to be said of uses, previous to our observations upon the 27 Henry 8. c. 10. must be understood as being subject to the statutes before recited.

In considering the nature of uses, I shall first enquire what were the requisites to be observed in raising uses; and then what were the properties of these uses, when raised. In the foregoing pages I have been led to anticipate many things, which properly apply to this place.

First then, in order to raise a use, there should be a person or persons capable to stand seised to a use. Now *prima facie* every common person can stand seised to a use: therefore it will be the best method to see who are exceptions to this rule; or rather who have not this capacity. A use was before described to be a trust or confidence, which is not issuing out of land, but as a thing collateral, annexed in privacy to the estate, and to the person, touching the land. It follows from this
 explanation

explanation of a use, that whenever the legal estate of feoffees to uses vests in a person, in whom the *confidence of person*, or *privity of estate fail*, there the use is either destroyed, or for a time suspended. Therefore, a lord by escheat, or the lord of a villein, could not stand seised to a use, because the title of the lord was by reason of his elder title, and that accrued to him either by reason of the feigniory of the land, or of the villein; which title was higher, and elder than the use, or confidence, and therefore could not be subject to it. And the same rule applies to a lord, who enters for mortmain, or who recovers by a cessavit, &c. for his title is paramount to the use^a.

Tenant by the courtesy cannot stand seised to a use; for he is *in* by the act of law in consideration of marriage, and is not *in* in privity of estate^t. And it seems by the better opinion, that a tenant in dower cannot stand seised to a use; and that for the same reason as tenant by the courtesy; for one is *in* by the act of the law, as much as the other^v. This opinion, however, has been doubted by Gilbert, though he seems to acquiesce in it in another place^w. So neither can a disseizor, abator, or intruder be seised to a use, although they have notice; for the use is not annexed to the possession of the land, which each of them have, but to the *privity of estate*, which is denied to them all: for they are not *in* in *privity of the estate*, to which the use is annexed, but in the *post*^x.

Though there be *privity of estate*, yet if *confidence*, either expressed, or implied, fail in

^a 1 Co. 122. a.^t 39. b.

B. N. C. 60.

^t 1 Co. 122. a.

Bro. feoff. al.

uses, pl. 40.

B. N. C. 60.

^v Ibid.^w Gilb. uses,

11. 171.

^x 1 Co. 122. a.^t 39. b.

the person, the use is either destroyed, or suspended. Thus, if a feoffee to uses infeoff another upon good consideration, who has also no notice of the former uses, here there is privity of estate; yet as there is no confidence in the person of the second feoffee, the use is entirely gone^y. But if the feoffment had been made *without consideration* to one, who had no notice^z, or with a good consideration to one, who had notice^a; in either case the privity of estate, and confidence of person, and of course the uses, are preserved.

^y 1 Co. 122. b.

^z Ibid.

^a Plowd. 351.

From what has been said it appears, that if there had been a tenant for life, remainder to the use of another in fee, and tenant for life had made a feoffment in fee to one, who had notice, the feoffee could not stand seised to the first use, because the use was annexed to *one* estate, and he was in of *another*^b. So too if there had been cestuique use for life, or in tail, with remainders over in use, and cestuique use for life had made a feoffment over, the feoffee would not have stood seised to the former uses^c. If also a feoffee to a use bound himself in a statute, &c. and the commonzee had taken out execution, he should have had the land to his own use; for the consideration of law was sufficiently valuable to raise the use in him^d. So too in a case since the statute of uses^e, where A. and B. were seised to the use of J. S. in tail, remainder to the use of W. in tail, remainder to the use of the right heirs of J. S.; A. and B. and J. S. made a feoffment to three persons to different uses. Two of the feoffees had notice of the former uses. It was held that the

^b 1 Co. 122. b.

^c Plowd. 351.

^d Bro. feoff. al. uses, pl. 10.

^e Hob. 348. Earl of Ormond's case.

the new feoffees could not stand seised to the old uses; but as the two feoffees had notice of the first uses, they were bound to make a recompence for the change of the old uses. If a feoffee of a manor to the use of A. had released to the tenants, they would not have held it subject to the use of A.; for the feignory was drowned in the tenancy, which they had to their own use^f.

^f Bro. scoff. 41.
uses, pl. 10.

The king cannot stand seised to a use; therefore if lands be given to the king and a common person, *pour term de leur vies*, to certain uses, the uses are void for a moiety^l. Neither can the queen be seised to a use^m.

^l Ba. uses, 56.

^m Ibid. 57.

A corporation, abbé, mayor, commonalty, aliens born, and persons attainted, cannot be seised to a useⁿ. Therefore, in a case where an alien and another were enfeoffed to uses, the moiety of the land went to the crown, discharged of the uses^o.

ⁿ Bro. scoff. al.
uses, pl. 40.
^o Co. 122. a.

^p Dyer, 283. b.

A *feme covert*, and an infant, however, are not excluded from the number of those who are capable of being seised to a use^p. Before the statute of 27 Henry-8. c. 10. if they had been directed to execute the estate to the cestuique use, or to another, by the court of chancery, during the coverture, or infancy, they might have afterwards defeated the same. But since the statute, no right is saved to them. At this day, an infant trustee may levy a fine by virtue of 7 Ann. c. 19. empowering infant trustees to convey estates. But lord Hardwicke doubted whether the judges would permit an infant trustee to *suffer a recovery*, unless he procured a privy seal for that purpose^r.

^p Ba. uses, 58.

^r 3 Aik. 164.

Vid. sup. from.
pa. 42 to 60.

Concerning the limitation of uses upon the estate of tenant in tail, for life, and years, sufficient has already been said.

Secondly. As there should be a person capable of being seised to a use, so there should also be a person capable of *receiving*, or taking such use. And with respect to this, it may be observed, that whoever is capable of taking the *lands* themselves, can also take the same estate by way of use^s. Thus a corporation is prevented by the statutes of mortmain from taking lands without licence; yet as they may purchase *lands* with licence, so may they have the use of lands^t. So too the king cannot take any thing, but by matter of record^v; yet as he can take an estate in the land, so can he the *use* of the land by matter of record. Therefore, if a man levies a fine, or suffers a recovery to the king's use, and declares the use to the king by a deed of covenant *inrolled*, it is good to raise a use in the king, though he is no party to the conveyance^w. But this use to the king should be raised by a conveyance of record; and not by a conveyance merely appearing of record; thus, if I *covenant* with J. S. to levy a fine to him to the king's use, which I do accordingly, and the deed of covenant is *not inrolled*, but is found by office, the use does not vest in the king; but if the covenant had been to enfeoff J. S. to the king's use, and the deed had been *inrolled*; and the feoffment found by office, then the use would have vested^x.

^s Shep. T. 484.

^t Shep. T. 484.

^v Bro. feoff. al.
uses, pl. 17.

^w Ba. uses, 60.

^x Ibid.

^y 13 H. 7. 9. b.
also Bro. feoff.
al. uses, pl. 29.

A limitation of a use to a parish is void as a use, as we have before seen^y. But this use is good

good as a *trust*; of which the parishioners may by a bill in chancery enforce the performance², provided the trust does not come within the statute 23 H. 8. c. 10. The same rule holds with regard to any indefinite multitude without public allowance; for they cannot take any property by a general name in the thing trusted, by the rules of the common law³.

² 2 Vera. 387.

³ 13 H. 7. 9. b.

Whether an *alien* could be cestuique use was formerly a question of litigation: and indeed I believe it is not yet settled by any determined case; some holding that a use being merely in conscience, equity might direct a performance for the benefit of the alien^b; whilst others say, that an alien could not compel the feoffees to execute a use, it being contrary to the law of the kingdom that an alien should plead, or be impleaded in any of our courts^c. Whether indeed even at this day an alien can purchase lands in the name of a *trustee*, without being subject to a forfeiture of the trust to the king, is a point also perhaps not quite settled^d: though indeed, by the better opinion, it seems that the king will be entitled to the trust of an alien *cestuique trust*^e.

^b 12 H. 7. 48. a.

Bro. feoff. al.

uses, pl. 29.

Allen, 14.

Vide preamble to the stat.

27 H. c. 10.

post.

^c Gilb. uses, 45.

Allen, 15. 16.

Styles, 40.

^d 1 Roll. ab.

194. pl. 8.

^e 3 Cha. Rep. 35.

Nelson's

Rep. 131.

Thirdly, There should be in most cases a *consideration* to raise a use. I shall in this place mention the manner in which a use is raised on the different conveyances now in practice; and I must particularly beg the reader's attention to this division, as indeed the same consideration is as necessary, and the same mode adopted in raising uses at the present period, (with respect to such conveyances as

are

are made either expressly or impliedly to uses) as was used previous to the enacting of 27 H. 8. But with respect to bargains and sales, and covenants to stand seised; the consideration necessary to be expressed in them will be considered, when we come to mention those particular conveyances.

With respect to feoffments *in fee*; if there be no consideration expressed in the deed, and no declaration of the use, the feoffee will stand seised to the use of the feoffor^f. Upon this principle it has been resolved^g, that if a man, seised on the part of his mother, make a feoffment without any consideration or declaration of the use to the feoffee, and then take back the estate to him and his heirs on his father's side, still the lands will descend, as they would have done before the feoffment, viz. on the mother's side: for, there being no consideration or declaration of the use expressed in the first feoffment, the feoffee is *in* of the *old* use. It would have been exactly the same in this case, if the use had been expressly declared on the first feoffment to the feoffee himself. It must be observed, that where there are express words to declare a use on a feoffment, no other consideration was ever thought necessary to raise the use^h; and indeed that opinion has long been acquiesced in. Therefore, where A. in consideration of £. 100 paid to him by B. made a feoffment to the use of B. and C. his son, it was held that this declaration of the use to C. raised the use to him, notwithstanding the consideration was paid by B.ⁱ

^f Perk. 533.

^g 1 Co. 100. b.
Har. Co. Litt.
12. b. n. 2.

^h Salk. 591.

ⁱ Lev. 406.

² Roll. ab. 780.

² P. W. 139.

^a Perk. l. 937.

² Roll. ab. 791.

What

What has been said of the consideration to raise, and the declaration to direct, the use on a feoffment, will equally apply to fines and recoveries. For Rolle tells us, that if a fine be levied, or recovery suffered, and no uses are declared on them, the recoveror or conuzee will stand seised to the use of the recoveree or conuzor^k. And if uses are declared on the fine or recovery, there needs no other consideration to raise the use; in which they have the same construction as uses declared on feoffments^l. So if there be two joint-tenants, one in fee, and the other for life, and they levy a fine without declaration of any use, the use shall remain unto them in the same estate as they had before in the land^m. Also, if A. tenant for life, and B. in reversion or remainder, levy a fine generally, without any limitation of the uses, it shall be to A. for life, remainder to B. in fee: for each grants that which he may lawfully grant; and each shall have the use according to the estate, which he conveyedⁿ.

^k 2 Roll. ab.
789. pl. 1, 2.
9 Co. 8. b.

^l 1 Co. 176. b.
Moor, 102.

^m 2 Co. 58. a.

ⁿ 2 Co. 58. a.

It was formerly held, that if a man had delivered money to J. S. to purchase land for him, and J. S. purchased the land to his *own* use, it should be to the use of J. S. and not to him who paid the money^o. But now since the introduction of *trusts*, equity has acted upon a more liberal principle; and in a similar case has decreed it to be a resulting *trust*, notwithstanding the statute of frauds and perjuries, which requires all declarations of trusts to be in writing^p.—But more of this hereafter.

^o Bro. feoff.
al. uses, pl. 40.

^p Vide infra.

It

1 & Co. 586.

It appears also, that if A. be seised in fee of one acre of land, and he and B. levy a fine of it to another, without any consideration or declaration of the use, the use shall result to A. *only*, and his heirs⁹.

I shall now speak of the consideration necessary to raise a use in the conveyance of *lease* and *release*; the most modern species of assurance. It may at first seem strange to mention the consideration necessary to be expressed in this conveyance, in order to raise a use before the statute 27 H. 8. when it is well known, that this conveyance was not invented till after the passing of that statute. But to this I must observe, that uses at *common law* are always raised on a lease and release. The statute 27 H. 8. did not abolish uses, whatever it intended to do. It only annexes the possession to the use. Now, in order to raise a modern and *permanent* trust of inheritance by this conveyance, there must be a legal estate at *common law*, and a *use* at common law; which use the statute executes, and makes the estate of *cestuique use* a legal estate, *according to the statute*: then comes the declaration of the modern trusts. Now, in order to raise this use at common law on a lease and release, we must consider whether this conveyance (I mean the release) should not have the same construction with regard to the consideration, as a feoffment had. In the first place, I take it, that a lease and release must be considered as a conveyance deriving its force from the *common law*¹. This will appear, if we recollect the principles upon which it operates. It is in fact two distinct

¹ Vide 7 Mod.
76, 77.

conveyances; the one creating a lesser estate, and the other releasing to and enlarging that estate. To create this lesser estate (which is generally for the term of one year) any conveyance may be used, which will completely vest the legal estate in the grantee of the term, so as to render him capable of receiving a release of the larger estate. Therefore a lease *at common law* will effectually serve the purpose. I am aware, that it is the universal practice at present to create this term of one year by a *bargain and sale*, because it saves an actual entry. Yet this does not prove it to be a conveyance deriving its effect from the statute of uses; for the constitution of the term itself creates the foundation of this assurance, and not the conveyance by which it is constituted: for whether the term be created by a *common law lease*, or by a *bargain and sale* (both of them being merely auxiliaries to the whole conveyance) is immaterial to the operation of the release, which is the grand part of the conveyance. We will then suppose this term to be already created (though, by the bye, if it be created by a bargain and sale, there should be the consideration of five shillings, or the like; or if it be created by a lease at common law, there is no consideration perhaps at all*, or at most only the reservation of a pepper-corn rent, or the like required) then the question will be, whether the releasor and releasee stand in the same situation as a feoffor and feoffee stood with regard to the consideration or declaration of the use? And I apprehend that they do. The reasons for the con-

* Vide Bro.
feoff. al. uses,
pl. 47.
B. N. C. 136.

constructions made in the above cases of feoffments, fines, and recoveries, seem to be, that the possession of the feoffee, conusee, and recoveror, being vested in them *before* any use can possibly arise, and there being no legal necessity that the use should be vested in or declared to them, because they are in possession (the feisin which they have being sufficient to serve uses to *any* person) the law will not suppose that the feoffor, conusor, or recoveree, intended to depart with the use, or beneficial interest in the land, without some expressed or implied consideration, or expressly agreed declaration. I say, there is no necessity to declare the use to those who have the feisin; for before the statute, though the land itself might expressly be conveyed to any one, yet it was the consideration, declaration, or notice which directed the use; the use and land being distinct. And so far it is the same since the statute. Besides which, the *possession* does not now draw the *use*, as it did before the statute, but the *use* the *possession*. Therefore, to whomsoever the use is declared, the possession is likewise carried: so that the use governs the possession. These conveyances then differ from a bargain and sale, which first passes the *use*, and then the statute executes the possession in *cestuique use*. It follows from these principles, that all assurances which first pass a sufficient feisin or possession to serve uses declared on such conveyance, or rather which first pass the possession, and then the use, must have a construction similar to that of feoffments, fines, and recoveries. Now, this is the case of a release,

a release, which certainly gives a seisin before any uses can arise on it: for when the lessee or bargainee is properly constituted, and then receives the release, he has a compleat possession, and his seisin is sufficient to serve uses declared to the releasee, releasor, or any other person. And if the use is declared to the releasee, he is *in* by the common law^t, which shews, that a release does not derive its force from the statute of 27 H. 8. These observations, I hope, will explain the meaning of the phrase of *conveyances, which operate by way of transmutation of possession*. And taking it in this light, a lease and release is as much a conveyance, which operates by transmutation of possession, as a feoffment, fine, or recovery. That being the case, there can be no good reason to imagine that the releasor intended to depart with the use without some consideration or express declaration, any more than in the above cases of a feoffor, donor, or recoverer. Indeed, in compliance with these reasons, it seems now acknowledged, that, without the one or the other, the use will, in case of a lease and release, result to the releasor. This latter principle, however, has been doubted; and for a more full discussion of it I shall refer to a subsequent part of this essay.

^t Vide Butl.
n. 2. Co. Litt.
271. b. under
fo. 276. a.

We have seen, that an express declaration of the use is sufficient to raise it in any of the above conveyances, without any consideration. It remains now to see what consideration is necessary to raise these uses, when there is no declaration of them. It was before observed, that if a man made a feoffment

ment in fee, without any consideration or declaration of the uses, the law, judging of the *intention* of the parties, would not presume that the feoffor intended to depart with the use for nothing; and therefore held, that the use remained or resulted to him: or rather the feoffee had the possession to the use of the feoffor, or to such uses as he should by deed subsequent appoint^v. But where a consideration was expressed in the deed, there the same presumption did not hold; for the law, which gave the use to the feoffor in the first instance, because there was no equivalent given by the feoffee, would in the second, when there was a consideration given, adjudge the use to the feoffee^w. It seems, however, that any consideration, however trifling it may be, or any rent reserved, however small, will be sufficient to raise a use in the feoffee, conusee, recoveror, or releasee^x. I particularly mention the releasee as being warranted by the case of *Lloyd v. Spillet*^y, which case warrants the observation just made on the nature of a lease and release. The question in that case was, Whether the consideration of 10s. expressed in the release, was sufficient to pass the legal estate and use at common law to the releasee; to which use the statute would draw the possession, so as to make them both as one legal estate and possession by the statute, sufficient to declare a modern trust upon? And Lord Hardwicke clearly held, that the consideration of 10s. was of itself sufficient to create a use in a conveyance, which operated by way of transmutation

^v Vide

⁹ Co. 8. b. 10. a.

^w Vide

Perk. l. 718.

^x 1 Co. 24. a.

² Roll. ab. 787, 788.

^y Barn. Cha.

Rep. 384.

³ Atk. 148.

tion of possession, and that a lease and release was such a conveyance; consequently that the possession and use at common law were both in the releasee, and of course the legal estate since the statute. He also declared, that an express declaration of the use, without any consideration, would have carried it to the releasee.

However, though these small considerations will serve to raise uses in the feoffees, &c. yet it seems, that the feoffor, conusor, &c. notwithstanding the consideration is paid by the feoffee, conusee, &c. may limit the use to any other person^a: for the declaration of the use guides the construction of it, without any regard to the consideration^a. ^a Perk. f. 537. ^a Shep. t. 496.

What has been said of the manner of raising uses in the conveyances of feoffments, fines, recoveries, and leases and releases, must be understood of the creation of estates *in fee* in the feoffees, &c. But with respect to the conveying or creating of estates *tail*, for *life*, or *years*, sufficient has been said already. ^{Vide supra, 48. to 60.}

Concerning grants of *incorporeal* hereditaments, it must be noticed, that if a man, seised of a rent-charge, granted it *in fee*, without any consideration or declaration of the use, the grantee would have been seised of it to the use of the grantor and his heirs^b. ^b Perk. f. 530. But at the same time it was held, that if a man, seised of lands *in fee*, granted a rent issuing out of the same lands to a stranger, without any consideration, the grantee would have been seised to his *own use*^c. And it was said, that if a man had a *common in gross*, which was *certain in fee*, and had granted the same ^c Perk. f. 531. ^{cites} 14 H. 8. 5.

^a Ibid.

same *in fee*, without any consideration, &c. the grantee would be seised to his *own use*^d. Perkins, however, adds a *quære* to this last case. It therefore seems prudent, in all cases of grants of rent-charges *in fee* (which are *in esse* at the time of the grant) or *commons in gross*, to insert some consideration, or make some declaration of the uses, if the consideration be only that of five shillings, or the like. But all grants of rents, seigniories, or commons in gross, in *tail*, for *life*, or for *years*, are good to raise uses in the grantees, without any consideration or declaration of the uses^e.

^e Perk. c. 537.

Fourthly, To raise a use there should be a sufficient substance or thing, out of which the use may arise. Thus it was held, that all lands and inheritances local, as rents *in esse*, liberties, franchises, visible or local, might be conveyed to uses. But it was denied that personal inheritances, which had no relation to lands or local hereditaments, such as annuities, could be conveyed to uses^f. Likewise uses could not be raised out of such things, *quæ ipso usu consumuntur*, as commons, ways in gross, authorities granted to a man and his heirs to hunt in a park, chase, or forest^g.

^f W. Jones, 127.

^g Ibid.

So too it was held, that a man could not grant a use out of lands, which he was not seised of at the time of the grant. Therefore, if a man granted a use out of the manor of Dale, which manor he had not purchased, the use would not have passed or be vested in the grantee, although the grantor had afterwards purchased the manor^h. This was construing

^h 2 Roll. ab.
790.
Cro. Eliza. 401.

construing the use according to the maxims of common law grants; for if in the same manner a man had granted a rent charge out of the manor of Dale, when in truth he had nothing in the manor, but had purchased it afterwards; yet the grantor would have held it discharged of the rent charge^h.

^h Perk. f. 65.

We will now examine the properties of this use at the common law. In the first place then, it was held to be *descendible* according to the rules of the common law respecting estates of inheritanceⁱ. This construction was given by the chancery, which, when questions of this nature arose, consulted the rules of law respecting the descents of inheritance; thereby, in this instance, following the old maxim, that *æquitas sequitur legem*. Indeed, this was but proper, for the chancery, not having a legislative power, could not set up new rules of property; for as Gilbert observes, to abrogate and set aside laws, is equal to the power of making them^k.

ⁱ 2 Roll. ab. 780.

^k Gilb. uses, 16.

According to this imitation of the rules of common law, I believe it is a point clearly settled in our books, that there might have been a *possessio fratris* of a use^l. Therefore if a man was seised of a use in fee, and had issue a son and a daughter by one *venter*, and a son by another *venter*, and died; the eldest son entered, and died without issue; the daughter should inherit the use, in exclusion of the younger son, according to the rules of lands of inheritance in a similar case^m.

^l 5 E. 4. 7. b.
¹ Co. 84. a.
121. b.

⁴ Co. 23. a.
Co. Litt. 19. b.
Dyer, 10, 11. d.
Plowd. 58.

^m Litt. f. 8.

Lord Bacon, indeed, in speaking of this idea of a *possessio fratris* of a use, calls it a vulgar opinionⁿ: he admitting at the same time,

ⁿ Ba. uses, 11.

time,

time, that it was the practice to make such a construction, where the *intention* of the parties did not specially appear to the contrary. Perhaps he thereby meant, that it was a point merely discretionary in chancery, and not any fixed rule. But notwithstanding this observation of that writer, it certainly was an established rule in chancery, as appears by the above citations.

Upon these principles, if there had been a use of lands held in *Borough English*, or in *gavel-kind*, it would have descended in the first instance to the youngest son, and in the second to all the males^o. So if there be a custom that lands shall descend to the eldest daughter, and there be a feoffment made which directs the use to go to the heir, yet it shall descend to the daughter alone^p.

Secondly. In the above instance we see a use considered as an hereditament: but it was also considered as a chattel. Thus it was held to be *devisable* as a chattel before the statute of wills, thereby, under the colour of allowing a devise of the *use*, in effect permitting the *lands* themselves to be devised^q: for the devisee of the use had all the advantages which *cestuique use* himself had. Lands themselves were not held to be devisable after the conquest, because no lands could pass by the common law, but by livery of seisin^r; and because it was contrary to the nature of the *feud*, that the feudatory should dispose of it by will^s. This use was allowed to be devised by a noncupative will; so that if a feoffment in fee had been made to the uses of such persons, as the feoffor should name

^o 2 Roll. ab.
780. 1 Co. 88.
a.

^p 2 Roll. ab.
780.

^q Wright's Ten.
174. ed. 1768.

^r 1 Co. 123. b.

^s Wright's Ten.
174. ed. 1768.

name by his last will, &c. he might have limited these uses by a nuncupative will ^{1. 1 Co. 124. b.} However, if an infant cestuique use had made a will of the use, it would have been void ^{v. 2 Roll. ab.}

Thirdly. As cestuique use might devise the use, so might he alien, or transfer it by the common law ^{779.}. But though he could alien, ^{= Doe. facit. xl. uses, pl. 44.} or transfer the use itself by the common law, ^{B. N. C. 75.} yet he could not alien the legal estate in the land. ^{Plowd. 350.} To remedy this defect was the statute ^{Gilb. uses, 16.} of 1 Richard 3. made, but we have already had an exposition of that statute, and have seen how very ineffectual it was for the purposes it was passed. ^{Ba. uses, 16.}

Fourthly. It was held by the common law, that cestuique use had neither *jus in re*, nor *jus in rem* ^{x.}. The *jus in re* meant an estate, ^{= 1 Co. 121. b.} and the *jus in rem* a demand ^{v. Jones. 127.}. A use was held to be neither. This construction we may easily conceive to have been admitted; for uses were not in their origin cognizable by the courts of law; therefore, that being the case, it is natural to suppose, that those courts did not allow them to have either the *jus in re*, *aut jus in rem*. Yet whatever might have been the construction of the courts of law, yet it is very certain, that the chancery, in first exercising a discretionary power, in time reduced that discretion to a certain fixed rule of the court: and authorized cestuique use not to deem relief or a decree as a matter of favour, but as a matter of right. But even in the courts of law *cestuique use* had many of the privileges of the owner of lands. Thus a cestuique use might have been sworn upon

^a Co. Litt. 272.
a. b.

^c Vide 2 Atk.
150.

^b Ba. uses, 5,
6, 7.

^c 15 H 7 2.
Bro. feoff. al.
uses, pl. 39.

^d Ibid.

an inquest²: for which sir Edward Coke very properly gives this reason, That at the time of the making of the 2 Henry 5. c. 3. the greater part of lands (during those troublesome and dangerous times, when the unhappy controversy between the houses of York and Lancaster had begun) were held in use^a. And the statute was made to remedy a mischief, which used to happen from the sheriff's returning men of no understanding, and that statute provided that he should return proper men. Now, though the feoffees, in case of uses, had the legal estate in the land, yet the courts, for the advancement and expedition of justice, extended the statute (against the letter) to the cestuique use, and not to the feoffees. This tends to shew, however, that cestuique use, even by the common law, was considered as having property in the use of the land in some respects. So too he was considered as tenant at will to his feoffees, and was punishable in an action of trespass towards them^b. But notwithstanding cestuique use had these, and the like properties in the use by reputation, and the sanction of equity, yet, in the eye of the law, he was considered as having no property in the land, with respect to his being the *ostensible* owner of it. Thus, if he came upon the land, he was considered merely as a trespasser^c. And though, after the statute of Richard 3. he was enabled to make feoffments, yet, until he made the feoffment, he was still reckoned as a trespasser, upon his entry on the land for any other purposes, than to make alienations: nor could he bring an action, avow, &c. but in the names of his feof-

feoffees^d. So he could not justify for damage
 faitant; and though it was held he could
 grant the herbage, and corn, yet he could
 not take them himself^e. Though the statute
 of Richard 3. allowed him to make leases,
 and he was permitted to bring an action of
 debt for the rent, yet he could not avow^f:
 and upon the making of a lease by cestuique
 use, the reversion still continued in the feof-
 fees, who might bring an action of waste, or
 enter for a forfeiture^g. Upon these princi-
 ples of the common law, that cestuique use
 had no property in the land, it was held, that
 his wife was not dowable of a use^h: neither
 was the husband of a feme cestuique use per-
 mitted to have his courtesyⁱ. Cestuique use
 did not forfeit his lands, (by the rules of the
 common law,) upon the commission of trea-
 son, or felony^k: and it was said, that if
 cestuique use committed felony, the lord
 should not have the lands, neither should the
 heir have them on account of the corruption
 of blood; of course the feoffees would have
 had them^l. Again, the use itself was not
 subject to wardship of lands held in soccage,
 to marriages, reliefs, and in effect did not
 render to the lords the first fruits, and benefits
 of their seigniories, even after the passing of
 the statutes 4 Henry 7. c. 17. and 19 Henry
 7. c. 15^m. The use also was not subject
 to any executions, as appears by the statute
 19 Henry 7. which makes the land itself
 liable to executions for debts of cestuique
 use due by judgmentⁿ. It also appears, by
 several statutes before enumerated, that an
 action was not maintainable by the common
 law against cestuique use or the pernor of

25. H. 7. 27.
 Bro. feoff. al.
 uses, pl. 13.

27 H. 8. 13.
 Bro. feoff. al.
 uses, pl. 6.

8 H. 7. 8.
 Bro. feoff. al.
 uses, pl. 26.

Perk. f. 349.

1 Co. 123. b.
 Perk. 463.

Jenk. Cent.
 190.

5 E. 4. 7.
 Bro. feoff. al.
 uses, pl. 34.

1 Co. 123. b.
 Jenk. 190.
 Dyer, 174.
 Keilw. 86. a.

19 H. 7. c. 15.

1 R. 2. c. 9.
4 H. 4. c. 7.
11 H. 6. c. 4.
1 H. 7. c. 1.
1 Co. 121. b.

the profits^o. Finally, uses were not considered in the hands of the executor or heir as assets to satisfy creditors^p; which particularly shews what trifling regard the courts of law shewed to uses, especially as they have ever been anxious to befriend *bonâ fide* creditors.

^q Butl. N. 1. to
Co. Litt. 271 b.
under fo. 272. b.
^a Bro. feoff. al.
uses, pl. 10.

In this situation stood the use and cestuique use at the common law. Whereas, on the contrary, the feoffee to uses was the complete ostensible owner of the land. He performed the feudal duties^q. His wife had dower^a: and his estate was subject to wardship, relief, &c. The feoffee had authority to sell the land, was tenant to the lord, and forfeited the lands if he committed treason, or felony. In short, he might bring actions, &c. as if he held the land discharged of the use^r.

^r Dyer, 9. b.
Jenk. Cent.
130.

Fifthly. The use did in many instances ensue the nature of the land: thus, if a man, seized of lands on the part of the mother, made a feoffment without any consideration or declaration of the use, and then took back an estate to him and his heirs on the part of his father; still, as the use was never out of the feoffor, it continued in him as of the old use, and would descend to the heirs on the mother's side^s. So too if there be two joint tenants, one for *life*, and the other *in fee*, and they levy a fine without declaration of any use, the use shall be to them of the same estate as they had before in the lands^t. In the preceding observations upon the nature of a use, we have seen in many instances, that it ensues the nature of the land; such as, there being a *possessio fratris* of a use, it being de-

scendible,

^s Har. Co. Litt.
22. b. n. 2:

^t 2 Co. 58. a.

scendible, &c. But uses, as lord Bacon observes, in many instances differed from cases of possession ^v, which he accordingly enumerates. Thus, by the common law, a warranty would neither bind, nor extinguish, the right of a use; but it would the right of possession ^w. There was no necessity at common law for any consideration to establish a deed, nor did notice constitute covin, or make a *particeps criminis* ^x; whereas in respect to uses, *no consideration*, although there is also *no notice*, will render the deed covinous: or if there be a good consideration, but *with notice*, that will have the same effect ^y. So too a right of action by the common law was not assignable; but the *subpœna* in case of a use could always have been assigned ^z. Again—^a Ba. uses, 16, at common law a man cannot have the land itself, and a rent issuing out of that land to himself; but the use of land, and the use of the rent, might have well stood together in one person ^a. To these differences between uses and cases of possession, marked out by Bacon, we may add, that by the common law, if a man had enfeoffed another without adding the word *heirs* to the estate limited to the feoffee, he would have had but an estate for life ^b. But if a man had before the statute 27 Henry 8. c. 10. bargained and sold his land for money, the bargainee would have had an estate in *fee*, without the word *heirs* ^c. And the reason was, because by the common law nothing passed from the bargainee, but a *use*, which use was guided by the *intent* of the parties. Now it was held that as the bargainee paid a valuable consideration for the land,

^v Ba. uses, 13.

^w Ibid. 11 to 18.

^x Ibid. 13, 14.

^y Plowd. 351.
^z Roll. ab. 779.

^a Ba. uses, 16.

^a Ibid. 18.
¹⁴ H. 8. 4.

^b Litt. f. 1.

^c 1 Co. 100. b.
Co. Litt. 9. b.

land, he should in equity (the director of uses) have the whole estate in *fee simple* of the use^d. But this construction is altered since the statute of 27 Henry 8. c. 10. and made like that of the case mentioned by Littleton^e. So also if an estate was limited at the common law to a man and his wife, that *should be*, the man in this case took the whole^f: but if a use had been limited in this manner, the wife would have taken according to the limitation^g. These cases, I hope, will suffice to shew the distinction between the construction of uses, and the possession. I shall only subjoin one more case. If at the common law a man had made a feoffment in fee, to the use of A. for years, remainder to the use of the right heirs of J. S. this limitation had been good; for the feoffees remained tenants of the freehold. But since the statute 27 Henry 8. c. 10. which annexes the possession to the use, this limitation is also void^h.

Sixthly. Uses, like the land, might have been limited upon a contingency. Thus, if there had been a feoffment in fee to the use of A. for life, remainder to the use of him who should be the eldest son of A. this had been a good contingent useⁱ. As a use might have been limited on a contingency, so might it have been destroyed, or suspended. Therefore, if either *privity of estate or confidence of person* failed in the persons, who had the legal estate, the use was either suspended, or totally destroyed. Thus neither a feoffee upon good consideration and without notice, a disseisor, an abator, lord by escheat, corporation, alien born, nor a person attainted, &c. could stand seised

feised to a contingent use: for whenever the
 estate of the feoffees became vested in any of
 these persons, the contingent use was either
 suspended or destroyed ^k. I trust these ob- ^{1 Co. 122. a,}
 servations will give the reader a sufficient
 knowledge of the nature of uses, previous to
 the passing of the 27 Henry 8. c. 10. There
 may be other peculiarities relating to them,
 which have escaped my memory and observa-
 tion; these, however, which I have mentioned
 here, seem absolutely necessary to be known,
 in order to our having a clear and comprehen-
 sive idea of the present laws concerning *trusts*.
 It is unnecessary to observe, that before the
 statute 27 Henry 8. c. 10. uses had many
 mischiefs attending them. Lands and here-
 ditaments were secretly passed from one to
 another, by way of use, without the solemn
 ceremony of livery of seisin ^l. Uses were de- ^{1 Co. 123. a,}
 vised by last will, by bare words, and some- ^{124. b.}
 times by signs in great extremities. By frau-
 dulent uses heirs were oftentimes unjustly
 disinherited. Lords lost their wards, marri-
 ages, reliefs, and all the fruits and benefits
 of their feignories, notwithstanding the sta-
 tutes 4 Henry 7. 19 Henry 7. No pur-
 chaser could be assured of his purchase, not-
 withstanding the 1 Richard 3. No man
 knew against whom to bring his action, or
 have execution, notwithstanding the statutes
 1 Richard 2. 4 Henry 4. 11 Henry 6. 1
 Henry 7. and 19 Henry 7. Estates created
 by law in consideration of marriage, viz.
 tenancy in dower, and by the courtesy, were
 destroyed. Perjuries for trial of secret uses
 were committed. The king lost the benefit
 of

of escheats by attainder, purchases by aliens, wards, &c. and lords also lost their escheats, together with many other mischiefs.

To remedy these inconveniences the statute 27 Henry 8. c. 10. was made: which indeed directs the modern method of conveyancing. This statute, and its exposition, is now better understood than when lord Bacon wrote; who, speaking of it, says, "It is a Law whereupon the inheritances of this realm are tossed at this day, like a ship upon the sea; in such sort that it is hard to say, which bark will sink, and which will get into the haven; that is to say, what assurances will stand good, and what will not."

• Ba. uses, 1.

27 H. 8. c. 10.
Preamble.

The statute recites, "Where by the common laws of this realm, lands, tenements, and hereditaments be not deviseable by testament, nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made *bona fide*, without covin or fraud; yet nevertheless divers and sundry imaginations, subtle inventions, and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances, craftily made to secret uses, intents, and trusts; and also by wills and testaments sometime made by *nude parol*, and words, sometime by signs, and tokens, and sometime by writing; and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time

“ time as they have scantly had any good
 “ memory, or remembrance; at which times
 “ they being provoked by greedy and cove-
 “ tous persons, lying in wait about them, do
 “ many times dispose indiscreetly and unad-
 “ visedly their lands and inheritances; by
 “ reason whereof, and by occasion of such
 “ fraudulent feoffments, fines, recoveries, and
 “ other like assurances to uses, confidences,
 “ and trusts, divers and many heirs have been
 “ unjustly at sundry times disinherited, the
 “ lords have lost their wards, marriages, re-
 “ liefs, harriots, escheats, aids *pur fair fitz*
 “ *chivalier*, & *pur fill marier*, and scantly any
 “ person can be certainly assured of any lands
 “ by them purchased, nor know surely
 “ against whom they shall use their actions,
 “ or execution, for their rights, titles, and
 “ duties; also men married have lost their
 “ tenancies by the courtesy, women their
 “ dowers, manifest perjuries by trial of such
 “ secret wills, and uses, have been com-
 “ mitted; the king's highness hath lost the
 “ profits and advantages of the lands of per-
 “ sons attainted, and of the lands craftily put
 “ in feoffments to the uses of aliens born,
 “ and also the profits of waste for a year
 “ and a day of felons attainted, and the lords
 “ their escheats thereof; and many other in-
 “ conveniencies have happened, and daily do
 “ increase among the king's subjects, to their
 “ great trouble and inquietness, and to the
 “ utter subversion of the ancient laws of this
 “ realm: For the extirpating and extinguish-
 “ ment of all such subtle practised feoff-
 “ ments, fines, recoveries, abuses, and errors
 “ here-

The inconveni-
 ences attending
 conveyance,
 and devises to
 uses,

“ heretofore used, and accustomed in this
 “ realm, to the subversion of the good and
 “ ancient laws of the same, and to the intent
 “ that the king’s highness, or any other of
 “ his subjects of this realm, shall not in any-
 “ wise hereafter, by any means or inventions
 “ be deceived, damaged, or hurt by reason
 “ of such trusts, uses, or confidences, it may
 “ please the king’s most royal majesty, that
 “ it may be enacted by his highness, by the
 “ assent of the lords spiritual and temporal,
 “ and the commons in this present parlia-
 “ ment assembled, and by the authority of
 “ the same, in manner and form following,
 “ that is to say, That where any person or
 “ persons stand, or be seised, or at any time
 “ hereafter shall happen to be seised, of and
 “ in any honours, castles, manors, lands, te-
 “ nements, rents, services, reversions, re-
 “ mainders, or other hereditaments, to the
 “ *use, confidence, or trust* of any person or
 “ persons, or of any body politic, by reason
 “ of any bargain, sale, feoffment, fine, reco-
 “ very, covenant, contract, agreement, will,
 “ or otherwise, by any manner of means
 “ whatsoever it be; that in every such case
 “ all and every such person and persons,
 “ and bodies politic, that have, or hereafter
 “ shall have, any such use, confidence, or
 “ trust, in fee simple, fee tail, for term of life,
 “ or of years, or otherwise, or any use, confi-
 “ dence, or trust in remainder, or reverter,
 “ shall from henceforth stand, and be seised,
 “ deemed, and adjudged in lawful seisin,
 “ estate, and possession, of and in the same
 “ honours, castles, manors, lands, tenements,
 “ rents,

The possession
 shall be in him
 or them that
 have the use.

“ rents, services, reversions, remainders, and
 “ hereditaments, with their appurtenances, to
 “ all intents, constructions, and purposes in
 “ the law, of and in such like estates, as they
 “ had or shall have in use, trust, or confi-
 “ dence, of or in the same; and that the
 “ estate, title, right, and possession, that was
 “ in such person or persons, that were or
 “ hereafter shall be seised of any lands,
 “ tenements, or hereditaments, to the use,
 “ confidence, or trust of any such person
 “ or persons, or of any body politic, be
 “ from henceforth clearly deemed and ad-
 “ judged to be in him or them, that have or
 “ hereafter shall have such use, confidence,
 “ or trust, after such quality, manner, form,
 “ and condition, as they had before in or to
 “ the use, confidence, or trust that was in
 “ them.

“ That where divers and many persons
 “ be, or hereafter shall happen to be, jointly
 “ seised of and in any lands, tenements,
 “ rents, reversions, remainders, or heredita-
 “ ments, to the use, confidence, or trust, of
 “ any of them that be so jointly seised, that
 “ in every such case, that those person or
 “ persons which have or hereafter shall have
 “ any such use, confidence, or trust, in any
 “ such lands, tenements, rents, reversions, re-
 “ mainders, or hereditaments, shall from
 “ henceforth have, and be deemed and ad-
 “ judged to have only to him or them that
 “ have or hereafter shall have such use, con-
 “ fidence, or trust, such estate, possession,
 “ and seisin of and in the same lands, tene-
 “ ments, rents, reversions, remainders, and
 “ other

S. 2. Convey-
 ances made to
 different per-
 sons to the use
 of one or some
 of them.

Saving of the
right of
strangers.

“ other hereditaments, in like nature, man-
“ ner, form, condition, and course, as he or
“ they had before in the use, confidence, or
“ trust of the same lands, tenements, or he-
“ reditaments: saving and reserving to all
“ and singular persons, and bodies politic,
“ their heirs and successors, other than those
“ person or persons which be seised, or
“ hereafter shall be seised, of any lands, te-
“ nements, or hereditaments, to any use,
“ confidence, or trust, all such right, title,
“ entry, interest, possession, rents, and
“ action, as they or any of them had or
“ might have had before the making of this
“ act.

Saving of the
right fees to
their own use.

3. “ And also saving to all and singular
“ those persons, and to their heirs, which be
“ or hereafter shall be seised to any use, all
“ such former right, title, entry, interest,
“ possession, rents, customs, services, and
“ actions, as they or any of them might
“ have had to his or their own proper use,
“ in or to any manors, lands, tenements, or
“ hereditaments, whereof they be, or here-
“ after shall be, seised to any other use, as if
“ this present act had never been had nor
“ made, any thing contained in this act to
“ the contrary notwithstanding.

4. “ And where also divers persons stand
“ and be seised of and in any lands, tene-
“ ments, or hereditaments, in fee simple or
“ otherwise, to the use and intent that other
“ person or persons shall have and perceive
“ yearly to them, and to his and their heirs,
“ one annual rent of £. 10. or more or less,
“ out of the same lands and tenements, and
“ some

" some other person one other annual rent
 " to him and his assigns, for term of life or
 " years, or for some other special time, ac-
 " cording to such intent and use as hath been
 " heretofore declared, limited, and made
 " thereof.

" Be it enacted therefore by the authority ^{§ 5 The execu-}
 " aforesaid, That in every such case, the ^{tion of rents.}
 " same persons, their heirs and assigns, that
 " have such use and interest, to have and
 " perceive any such yearly rents, out of any
 " lands, tenements, or hereditaments, that
 " they and every of them, their heirs and
 " assigns, be adjudged and deemed to be in
 " possession of seisin of the same rent, of and
 " in such like estate as they had in the title,
 " interest, or use of the said rent or profit,
 " and as if a sufficient grant, or other lawful
 " conveyance, had been made and executed
 " to them, by such as were or shall be seized
 " to the use or intent of any such rent, to be
 " had, made, or paid, according to the very
 " trust and intent thereof; and that all and
 " every such person and persons as have
 " or hereafter shall have any title, use, and
 " interest, in or to any such rent or profit,
 " shall lawfully distrein for non-payment of
 " the said rents, and in their own names make
 " avowries, or by their bailiffs or servants
 " make continuances and justifications, and
 " have all other suits, entries, and remedies,
 " for such rents, as if the same rents had
 " been actually and really granted to them
 " with sufficient clauses of distress, re-entry,
 " or otherwise, according to such conditions,
 " pains, or other things, limited and appoint-
 " ed

“ ed upon the trust and intent for payment
 “ or surety of such rent.”

By the 6 f. it is enacted, That no woman shall have both a jointure and dower of her husband's lands.—By f. 7. a woman shall be endowed, where jointure is recovered by lawful action.—By f. 9. it is provided, that a woman may accept or refuse a jointure, settled after marriage.—By f. 10. it is further provided, that the statute should extinguish no statute, recognizance, &c. by the execution of any estate. Thus, for instance, if a man had an extent of 100 acres, and an use of the inheritance of one; now, the statute executing the possession to that one would have extinguished the extent, being entire in all the rest: or if the donor of a statute, having 10 acres liable to the statute, had made a feoffment in fee to a stranger of two of those acres, and after had made a feoffment in fee to the use of the donee and his heirs, this would have extinguished the recognizance^a.—S. 12, 13, direct, where fines for alienations, relief, and harriots, shall be paid to the king or common persons.—By f. 14. cestuique use may have all such actions and advantages as his feoffees might have had;—by f. 15, however, actions then depending by the feoffees were not to be abated.—By f. 16. it is provided, that the act shall not be prejudicial to the king on account of wardship, liveries, or for *ouster le main*.—The 17 f. is concerning recognizances taken to the king's use.—And f. 18. relates to lands executed to persons born in Wales.

^a Ba. uses, 53.

Whatever

Whatever might have been the intention of the legislature in passing this act, it certainly did not effectuate the total abolition of uses; it only destroyed the intervening estate of the feoffees^r. Lord Coke^s, and others,^{2Comm 333. 1Co.125.a.b.} have thought that the statute intended to extirpate uses themselves, and never meant that lands should pass subsequent to the statute by way of use, but only by solemn livery. And therefore they held, that these words of the statute, "*where any person or persons stand or be seised, or at any time hereafter shall happen to be seised,*" do not serve as a proof, that the makers of the act expected, that uses would be continued after the making of it; but that those words were only inserted to provide for a case which possibly might occur: As, supposing that a feoffee to uses had been disseised before the act, and then the act had been made; now, at the time of making the act, he certainly was not seised to the use of any person; but he might afterwards, by his entry, re-vest the uses, and then, being seised to the uses after the act, according to the words of the act, the use would have been executed to the possession of cestuique use. But surely this is an overstrained construction of the words of the act; for if this were the real intention of the legislature, it would have been very easy to insert these words, "*or hereafter shall be seised upon any feoffment heretofore made*." Besides, the statute of inrollments^v,^{t Vide Ba. uses, 39. 40. v 27 H.8.c.16.} which takes notice of uses, shews that the legislature meant *obiter* to sanction uses, by making an additional ceremony necessary to the conveyance of uses. Besides, the 12 f. of the

the act speaks of estates *to be* made and executed in possession. In short, I cannot help agreeing with Lord Bacon in the opinion, that the statute never intended to abolish uses. Lord Bacon, in speaking of a person who doubted of this doctrine says *, " And this was the exposition, as tradition goeth, that a reader of *Gray's Inn*, who read soon after the statute, was in trouble for, and worthily, who as I suppose was a *boy*." Indeed, with respect to a disseisin, before the statute, it was held by the same writer, that the regrefs of the feoffees, after the statute, was excluded by the two savings of the statute: for the first saving saves the right of all persons, *except the feoffees*; and the second saves the right of the feoffees to *their own use*: so that between both the right of the feoffees to the use of *another* was shut out.

As the statute did not *expressly* forbid the limitation of uses (and thereby make all uses void) there was actually no avoiding conveyances to uses after it; for the practice of uses being long established and acquiesced in previous to the making of the statute of uses, all lands were divided into two distinct estates, one in the *land*, and another in the *use* †. So that a man could not think of the case of *possession*, without at the same time being reminded of the *use*. This the makers of the statute must have been very well aware of, as appears by the act itself; they considered the properest method of remedying the inconvenience attending these two estates in the same property, and instead of abolishing and annulling all limitations of uses,

* Ba. uses, 40.

† Co. Litt. 23. a

uses, they wisely incorporated and consolidated the two estates into one, transferring the *legal* to the equitable, and thereby rendering *both a legal estate* according to the statute. They most probably thought, that uses, under such a regulation, were better suited to mitigate the severity of the common law, and answer the contingencies of family settlements: therefore, after the passing of this act (it not enacting that there should be in future *no uses*) when a man made a feoffment to one, *without* any consideration or declaration of any use, what was the construction to be made in this case? We have seen that before the act, chancery, which ever watches over the consciences of men, and never establishes a *donum gratuitum*, would have construed the *possession* to be in the *feoffee*, and the *use* in the *feoffor*. Now, does the statute contradict or destroy this construction? No truly; for it answers to, and comes within, the very words and meaning of the statute; which says, *that where any person, &c. stands seised to the use of another, by reason of any feoffment, &c. or by any manner of means whatsoever*; now here in this case the feoffee stands seised to the use of another, viz. of feoffor, by an admitted construction before the act. And the act does not say where any person stands seised to the use of another by *express declaration*; so that whether the feoffee stands seised to a use by *express declaration*, or by *construction* of law, he equally comes within the meaning and equity of the act, and as much within the words in the one case as the other. As the

• Vide
2 Raym. 800.
also Co.
Litt. 22. b.
Jenk. Cent.
253.

• Co. Litt.
271. b.
Co. Litt. 23. a.

statute did not intend to abolish uses, so neither did it intend to alter the manner of raising them. The statute only intended to execute the possession to the use, and make the estate of cestuique use a legal estate, instead of a trust estate: but it did not mean to make any thing pass by a conveyance, which did not pass before; that is, it did not intend that the *land* and *use* should pass, where only the *land* passed before the statute¹. Therefore, in the case I have put, the use not passing, it draws back to itself the estate in the land passed by the conveyance, and then the statute executes the possession to it. This kind of resulting use, or use by operation of law, clearly owed its origin to an equitable and just construction; for as the possession and use were distinct properties before the statute, the courts of law, which took cognizance of the former, permitted it to be aliened by express words without any consideration, the deed itself, by which it was conveyed, being thought a sufficient consideration; but the latter being solely under the jurisdiction of equity, that court would indeed, by express declaration, without any consideration, allow the use to pass; but unless there was such declaration or consideration, it held that the use remained in the donor². This was for very obvious reasons; for chancery would never have adjudged a man to have departed with his *usufructuary* property, without expressing his intentions of doing so, either by making an express declaration, or receiving some consideration, as indicative of such his intent. Upon these motives,

motives, I apprehend, were resulting uses first introduced: and that being the case, the same equitable principles, which sanctioned their *beginning*, would since the statute favour their *continuance*. In fact, resulting uses of this kind have been allowed since the statute, and being so are executed by it. These remarks may at first sight seem rather contradictory to the observation of *Holt*, in the case of *Shortridge v. Lamplugh*^b, who ^b 2 Salk. 678. held, that if a feoffment be pleaded, the use need not be averred to the feoffee; for if no consideration appears, and it is not expressed to whose use it should be, that it must be intended to the use of the *feoffee*, unless the contrary appears: and that was the form of pleading both *before* and *since* the statute: though he adds, that there is more reason for it *since* the statute; for if the use should be construed to be in the feoffor, the conveyance would be to no purpose: whereas, before the statute, there might be some end in making the feoffment, viz. to put the freehold out of the feoffor, and so prevent wardship, &c. To this observation of *Holt*, I must observe, that when he says that the form of pleading was such *before* the statute, he admits that the doctrine of resulting uses, as I have mentioned it, was acknowledged by the common law, and that the statute had not made any alteration therein, but only confirmed it. So he allows that the same construction must be had before and after the statute, with respect to the *doctrine* of resulting uses: but that the statute had confirmed the mode of pleading feoffments. It may here

c Holt. Rep.
237.

be asked, what utility can there be in resulting uses, if the use in pleading (there appearing no consideration or declaration of it) shall be construed to be in the feoffee? To which it may be answered, that though the rules of pleading do not require an averment of the use in the feoffee (they judging it to be in him without that averment) yet there may be always advantage taken of this resulting use, by averring it to be in the feoffor; and the want of a consideration and declaration of the use are sufficient circumstances to prove, that it was intended to the feoffor. This is laid down by *Holt* in another case^c, which fully shews that he acknowledged the doctrine of resulting uses after the statute. The reason which he gives, why the statute confirms this rule of pleading, appears to me to have been formed, without giving the subject a proper consideration. Admitting, indeed, that resulting uses were favoured, because they tended to serve some fraudulent purpose, such as cheating lords of their wards, &c. then we must agree with the chief justice. But if we suppose (as we have every reason to do) that the idea of resulting uses was introduced from an equitable motive of chancery, then the same construction must be made with respect to them now, as before the statute. 'Tis true that resulting uses before the statute, when the possession and use were distinct, might serve particular ends; whereas the resulting use is now executed by the statute, and therefore a conveyance of that kind would be of no such service. But surely we are not to favour resulting uses, because they

they countenance unjust evasions of the law; rather let us preserve them *since* the statute, when they cannot do any mischief, and may prevent a man from giving his property away without any express consideration or agreement. Besides, we are not now to judge of any particular operation, which they had subsequent to their commencement, but of their *continuance* from their *causes*, which before and after the statute remain the same. In short, there is not a doubt, but even the courts of law have long acknowledged the doctrine of these resulting uses: though indeed, by their manner of construing them, with respect to their pleadings, they do not seem very willing to favour them. But should a question of this kind be brought into chancery, there the doctrine of the resulting uses we have been treating of would certainly hold good in every respect. Indeed, in the case of *Lloyd v. Spillet*^f, determined in that court, it was even doubted, whether the consideration of 10s. and also a declaration of the use to the donee, would pass the use, and of course the legal estate since the statute; but the court held, that either of them alone would carry the legal estate. By which it is clear, that the court would not have made that construction, unless there had been the one or the other.

• Dyer 146. b.
Perk. 533.
2 Roll. ab. 78a.
Salk. 678.
2 Raym. 798
to 803.
7 Mod. 71 to 77:

^f Barn. Cha.
Rep. 384.

The preceding observations are made upon a case of a feoffment *in fee*, without consideration or declaration of any part of the use. So that either the whole fee of the the use results to the feoffor, or remains in the

the feoffee or donee. The law equally favours a resulting use, where a man makes a feoffment, or other conveyance, and parts with or limits only a *particular estate* in the use, and leaves the residue undisposed of; for it is an established rule, that so much of the use as a man does not dispose of remains in him ^a. Thus, if a man enfeoffs another to the use of the heirs of the body of the feoffor, now as he has not disposed of the use during his life, it will result to him, and then he will have an estate tail executed in him ^b. So, upon the same principle, if a man enfeoffs another, without any consideration, to the use of himself for life, without declaring the remainder of the use in fee to himself, yet such remainder of the use will result to him, and then he will be in of the old use ^c.

^a Co.Litt.23.a.

^b 1 Mod. 161,
162.

^c 1 Roll.ab. 240.

^d Co.Litt.23.a.

It is the *intent* apparent on the deed, which directs the limitation of the uses with respect to resulting uses. Therefore the paying of 5*l.* or the like, shews an intent that the feoffees should have the use, where it is not otherwise expressly disposed of; whereas, on the contrary, the want of a consideration shews that the use was intended for the feoffor. This has been the construction upon feoffments, where no part of the use has been expressly limited. But, I apprehend, that the same rule, with respect to a nominal or implied consideration, does not universally hold, where any part of the use is limited *from* the feoffor, or his heirs, and the residue left undisposed of. Therefore, if a feoffment be made in consideration of a penny, or the like,

like, and the use is expressly limited to the feoffee *for life*, or to a third person for life, in these cases so much of the use as is not expressly limited away, will result to the feoffor, notwithstanding the nominal consideration of a penny, &c. ; for it is the intent that guides the use, and here, the feoffor expressly declaring a particular estate of the use, it shews, that if he intended to depart with the residue, he would have declared that intention also. As in the case of a feoffment, where no part of the use is declared, the nominal consideration shews the reason why the feoffment was made, viz. to the use of the feoffee ; so when a part of the use is limited away, it shews the motive and consideration of the making of the feoffment, viz. for such express uses, and no more ; and this express motive and consideration appearing, it will counteract the operation of the nominal consideration. This indeed exactly comes within the meaning of Sir Edward Coke's doctrine^k, before referred to.

^k Co. Litt. 23. a.
 supra, 134.

I think, that I am warranted in this observation by the opinion of the judges, in the case of *Shortridge v. Lamplugh*^l, who doubting, whether there could be a resulting use on the conveyance by lease and release (thinking the extirpation of the estate of the bargainee by the release, a sufficient consideration to raise the use in the releasee,) held notwithstanding, that whether the extinguishment of the bargainee's estate, or the consideration of 5s. in the bargain and sale, were sufficient considerations to raise a use in the releasee, or no, yet that if any part

^l 2 Baym. Rep.
 798 to 803.
 7 Mod. 71 to 77.
 2 Salk. 678.

of

of the use had been limited expressly away, the remainder of it, undisposed of, would have resulted to the releasor. Indeed there are other instances besides these, where the courts, judging of the *intent* of the parties, have construed uses contrary to the rules I have been treating of. Thus, where A. levied a fine, and afterwards suffered a common recovery, wherein the conusee of the fine was tenant; now, as there was no use declared to the conusee, and no consideration to raise a use in him, the use would, according to the rules I have mentioned, have resulted to the conusor: but the court held, that as the intent of levying the fine was to make a tenant to the *præcipe*, the use should be construed to be in the conusee^m. So too, where a recovery was suffered to the *intent* to make certain estates; it was held that, though no uses were declared on the recovery, the use should be to the recoverer; for it was the meaning of the suffering of the recovery, that he should make estates, which he could not do, unless the use was in himⁿ. These two cases prove, that where the *intention* of the parties is evident in directing the use, there that intention will prevail, though there be neither a consideration, nor declaration of the use; and *e converso*, where the *intent* appears by limiting a *part* of the use, *that* will also prevail against a mere nominal consideration. This is carried still farther, by an opinion of Lord Dyer^o, who thought, that if a feoffment had been made in consideration of £.7,000 (or any other valuable sum) to feoffees, and *their heirs*, to the *use*

^m Holt Rep.
736, 737.
Salk. 676.

ⁿ Moor, 103.
pl. 248.
Dyer, 166.
a. in margine.
vide supra 16.
vide infra, 155.
139.
Jenk. Cent.
253.

^o Dyer, 169. b.
pl. 32.

of the said feoffees *for their lives*, the remainder of the use in fee, after the estates for lives, would have resulted to the feoffor, notwithstanding the valuable consideration.

In proceeding to shew, that the statute 27 H. 8. did not intend to abolish conveyances to uses, and that uses, which arose before the statute by implication of law, are now executed by the statute, I have been unavoidably led to consider the nature of *resulting* uses; which doctrine is indeed very necessary to be known, as it may occur in daily practice. But to resume our observations on the statute; what has been said concerning the execution of resulting uses by the statute, will serve to explain, or rather correct, an idea, which has generally prevailed, that the statute executes no use, but what is limited to a *third* person^r, that is, (as I understand the expression) a use resulted, or^r ^{Vide 2. Salk;} declared to the feoffor or feoffee is not executed by the statute: for if it goes to either, it certainly does not go to a *third* person. True it is, that if a use is declared to the *feoffee*, that he is in not by the statute, but by the common law^q. But to say, that if^r ^{13 Co. 56,} a use is declared to the *feoffor*, or if it results to him, that it is not executed in him, would be not only to contradict the authorities before-mentioned^r, but also to pervert the words of the statute, as is before shewn. Besides, in a case, where A. enfeoffed B. upon condition to convey to A. for life, it was held, that B. had the use in him; for, if it resulted to A. it would have been *executed in A.* so that B. would have had nothing in him^r ^{Vide also Vaugh. 389. Co. Litt. 22. b.}

* Jeak. Cent.
253-

him to convey to A.^s. The reason why a use limited to a feoffee, conusee, recoverer, or releasee, cannot be executed by the statute, is, because the statute expressly says, that where any person, &c. shall be seised to the use of any *other* person, &c. Therefore, to make a contrary construction, by adjudging the use to be in the feoffee, &c. by the *statute*, would be to violate the express words of the statute. However, even in this rule, we find some exceptions; for there are some particular cases, where a feoffee, &c. shall have a use limited to him, and also have that use executed in him by the statute. This happens where the whole seisin is given to the feoffee, &c.: and only an estate tail in the use is limited to the feoffee, &c. whilst the remainder over in fee is declared to another: or where the whole fee is limited to the feoffee, &c. and many estates in the use are carved out of such seisin of the feoffee, one of which estates in the use he takes. As an instance of the former, if A. enfeoffs J. S. in fee to the use of himself *in tail*, remainder to the use of J. A.; or if J. S. covenants to stand seised to the use of himself in tail, remainder over: in both these cases the estates tail are executed by the statute, though limited to the feoffee, &c. or covenanted, themselves^t. But I apprehend, that if the whole seisin in the case of the feoffment had not been limited to the feoffee, that it would be different: thus, if the feoffment had been to J. S. generally, habendum to and to the use of himself in tail, remainder to and to the use of J. A. in fee; now, in this case, J. S. has

^t Ba. uses, 63.

has not a seisin in *fee*, but only seisin to serve his own *estate tail*; and the use in remainder is served out of the seisin of J. A.; for the possession passes to him in the remainder by the first livery, though he is not party to the premisses^v; and though the livery is only made to J. S.^w; and that being the case, they both take according to the course of possession by the common law; for neither of them stand seised to the use of another person. So too, if the use limited to J. S. had only been *for life* or *years* instead of *intail*, that would also have altered the case^x: or if the estate had not been limited to the use of the feoffee in *tail*, but to the feoffor, or a stranger, with the remainder to the use of feoffee in *fee*, the feoffee would be in by the common law, and not by the statute^y. In like manner, if J. S. is enfeoffed in *fee* to the use of J. D. *for life*, remainder to the use of J. S. *in fee*, J. S. has the reversion in *fee* by the common law. But as instances of the latter kind of exception, if A. is enfeoffed to the use of B. *for life*, remainder to the use of *himself for life*, remainder to the use of the right heirs of C.; now A. is in by the statute, together with B. and C.; for the law will not allow of these fractions of estates^z. So if B. is enfeoffed to the use of himself and a stranger, or if a bishop and his heirs is enfeoffed to the use of himself and his successors; in the first case the estate of the feoffee, and stranger, and in the second, that of the bishop alone, is executed by the statute^a. So if a man makes a feoffment in *fee* to one, to the use

^v 2 Roll. ab. 68.

^w Litt. f. 60.

^x Co. Litt. 49. a. b.

If a feoffment had been to A. for years, remainder to B. in *fee*, and livery had been made to A. accordingly, this would have passed the *fee* to B. in course of possession at common law, when Littleton wrote, which was in the reign of Ed. 4. when the refined distinctions between *uses* and *possession* were unknown.

^y Ba. uses, 63.

^z Co. Litt. 23. b.

^a Ba. uses, 64.

^a Ba. uses, 64.

use of him, and the heirs of his body; in this case, for the benefit of the issue, the statute, according to the limitation of uses, devests the estate vested in the feoffee at common law (which is a fee simple) and executes the same to him in tail; and yet this is apparently against the express words of the statute ^b.

^b 13 Co. 56.

Having made these previous remarks on the statute, it will be necessary that we should follow a more regular plan, for the better considering the nature of uses since that statute. Therefore we must *first* enquire, *what kind of uses, and the manner in which uses are executed by this statute.*

2d. *What construction has been taken, when the use in fee simple, fee tail, for term of life, or years, has been executed in cestuique use.*

3d. *What that construction has been, when a use in remainder, or reverter, has been so executed.*

4th. *With respect to declaring uses.*

5th. *What uses are not executed by the statute.*

Before any use can be executed by this statute, it should be properly raised, according to the rules we have before taken notice of. Therefore the same *consideration*, and *declaration* of the use, is as requisite *since* the statute, as it was *before*. It should be raised out of the same hereditaments; and the same persons, that were capable of being seised to a use *before* the statute, are alone able to hold the seisin to serve the uses since the statute ^c. Indeed, with respect to this last rule, it is remarkable, that the statute throughout

^c 2 Comm. 333.

throughout on the part of the feoffees, only mentions,¹¹ *where any person or persons stand*, &c. which word *person* excludes *aliens*, and also *corporations*^d. But the statute with respect to *cestuique use* always couples the words *body politic* with that of *person*; so that it admits a *corporation* to be *cestuique use*, as before the statute, and denies that privilege to an *alien*. I must observe, that it has been a question *since* the statute, and indeed it is not now settled perhaps, whether a *tenant in tail* can stand seised to the use of another.

On the one hand, Sir Edward Coke^e, Sir G. Croke^f, Bulstrode^g, Sir F. Moore^h, and Rolleⁱ expressly tell us, that it was settled in the case of *Cooper and Franklyn*, that a tenant in tail neither *before* nor *since* the statute could stand seised to the use of another person, expressly, or impliedly. Whilst on the other hand, Godbolt directly asserts, that the case of *Cooper and Franklyn* was determined quite the contrary, viz. that a *tenant in tail* could stand seised to an *express use*, though not to an *implied one*^k: and Lord Bacon, in his reading upon the statute of uses, gives it as his decided opinion, that a *tenant in tail* may stand seised to an *express use* *since* the statute: for the statute, says he, does not save the right of tenant in tail; and the reason why a contrary construction was had before the statute, was, because the right of tenant in tail was expressly saved by 1 Rich. 3. c. 1^l. Of

this opinion seem also Perkins^m, Manwoodⁿ in *Walsingham's*^a case, and Lord Dyer^o. When so many respectable characters differ so widely on this point, it would be presumption

^d Ba. use, 42.

^e Co. Litt. 19 b.

^f Co. 78. a.

^g Cro. Jac. 400.

401.

^h Bull. 186.

ⁱ Moor, 848.

^j 1 Roll. Rep.

384.

^k 2 Roll. ab. 780.

Vide Jenk.

Cent. 195.

^l Godb. 269.

^m Ba. uses, 57.

58.

ⁿ Perk. f. 534.

537.

^o Plowd. 555.

^p Dyer, 312. b.

12. b.

tion in me to offer a *decided* opinion. Therefore, without entering into any kind of controversy, I will beg leave to make a very few observations on the subject.—The reasons, why a tenant in tail could not stand seised to the use of another person before the statute, were two: the one, on account of the consideration of *tenure*, between the donor and donee: and the other, on account of the statute Westminster 2. c. 1. which, as Sir E.

*Co.Litt.19.b. Coke observes P, appropriated the lands solely to the use of the tenant in tail. It requires,

*Bro. feoff. al. *quod voluntas donatoris in omnibus observetur* &
use, pl. 40.
B. N. C. 60.

This provision was made in order that the donee should not alien to barr his issue. Now it was a rule that no person could stand seised to a use, but one who could *execute* a perfect estate in the law to *cestuique use*. This a tenant in tail could not do, without committing a wrong, for which his issue had a remedy by a writ of *formedon*. It must be remembered, that when these notions were first introduced with respect to a *tenant in tail's* standing seised to a use, the *possession* and *use* were perfectly distinct estates. The feoffee was complete owner of the land, and he performed the feudal duties. Now as a tenant in tail held immediately of the donor, this of itself, in those days, when the feudal system was more punctually observed. was a sufficient consideration to create an express use in the donee; and when we add to this consideration the construction put upon the statute Westm. 2. c. 1. we cannot wonder, that a tenant in tail was considered as being incapable of being seised to another's use. But
what

what is the case since the statute? Surely we may be at liberty to make some difference. That consideration of tenure, and of holding immediately of, and performing the feudal duties to, the donor, does not now exist: for the possession now is not in him for a moment; but it is transferred to *cestuique use*, who is complete owner of the legal estate, to all intents, constructions, and purposes in the law: and as to the statute Westminster 2. c. 1. which is said so unalterably to have appropriated the lands to the donee, it only forbids the donee not to alien, and by construction not to execute an estate to *cestuique use*. But since the statute of uses, that provision is altogether inapplicable with respect to the execution of uses, for the *donee* does not now execute the estate himself; but the instant that the seisin is in him, the *statute* takes it out of him, and executes it in *cestuique use*. So that the same power, which at first forbad an alienation, or execution of the possession to the use in the case of a tenant in tail, has in this instance executed the possession, as soon as the donee in tail could have it. But to these observations it may be objected, that the same reasons will equally apply to corporations, aliens, &c.; and also that the statute did not intend to enable those to stand seised to a use, who before the statute were disabled. To that it may be answered, that before the statute there were three descriptions of men, who were unable to stand seised to the use of another: in the first class, were those who wanted either a privity in estate, or confidence in person; in the second,

we

we may reckon corporations, aliens, persons attainted, &c. ; and in the third, those, who had given such a consideration in return for their grant, as would absolutely keep the use to themselves, such as tenants *in tail, for life, or years*. With respect to the first, the reasons why they were incapable, are the same since, as before the statute ; with respect to the second, the statute itself excludes corporations, and aliens, and is very particular in using the word *person* on the part of the feoffees, and using that word, together with the words *bodies politic*, on the part of cestuique use. Besides, the reason which prevented most of that class from not holding lands to uses, is still the same, viz. an incapacity of holding the lands at all. But with respect to the third, there is clearly a difference since the statute. Tenant in tail might always have received, and held lands ; nor was there any want of confidence in his person, or privity in his estate. The only reasons were on account of the statute Westminster 2. c. 1. and the consideration of tenure ; both of which were good considerations, when the *possession* and *use* were separate ; but as the statute now has annexed the possession to the use, the reasons are changed. The incapacity of a tenant in tail to stand seised to a use did not arise from any personal disability, like the case of aliens, persons attainted, &c. but on account of the *estate* which he possessed, that estate being sufficient to create a use in himself ; and being also unalienable by the statute Westminster 2. c. 1. As to the latter reason, the statute of uses takes it out of his
power

power to alien; for as soon as the possession is in him, it transfers it to cestuique use, thereby allowing the donee to have only a momentary seisin. As to the former reason, the same consideration of tenure, which carried the use to the tenant in tail, would, as Brooke informs us, have carried it to a tenant for *life*, *before* the statute^r; and yet, I believe it to be a point now pretty universally acknowledged, that if lands are given to A. *for life*, to the use of B. *for life*, the statute executes this use in B. during the life of A^s. Now as A, we have already seen, could not stand seised to a use *before* the statute, and as the statute, which mentions the word *trust*, as well as *use*, would now execute the use or rather *trust* in B, we are induced to believe, that the statute intended not only to execute *uses* limited to arise out of the seisin of feoffees in *fee*, but also to execute *trusts* limited to arise out of the possession of those persons, whose *particular estates* in the lands necessarily drew the *use* to them, as tenants in *tail*, and *for life*. Therefore, if the statute had mentioned the word *possessed*, as well as *seised*, I apprehend the trusts declared upon a term of years would have been executed by the statute. It is also worthy of observation, that the statute 27 H. 8. does not, like the statute 1 Rich. 3. save the right of tenant in tail. Upon the whole, if lands should at this day be limited to A. in tail, to the use of B. in tail, this use or trust might *perhaps* be adjudged to be executed by the statute.

^r Bro. feoff. al.
uses, pl. 40.
B. N. C. pl. 60.
Perk. f. 535.

^s Dyer, 186. a.
pl. 1.
Shep. T. 483.
Perk. f. 535.
537.
Vaugh. 49.

*Supra, 144.

▼ 8 Co. 154. b.

With respect to the case of Cooper and Franklyn^t, A. enfeoffed B. ; habendum to B. and *the heirs of his body*, to the use of him, and *his heirs and assigns*. The question was, whether B. had an estate tail by the habendum, or a fee determinable without issue, according to the limitation of the use? But this appears to me to be a strange and refined question: for supposing the use had been limited to C. in fee, instead of B. and admitting that the statute had executed the use in C. how could C. be supposed to have a *fee simple* in him, determinable on *B.'s death without issue*? At common law, if a feoffment had been made to B. and the *heirs of his body*, habendum to him, and *his heirs and assigns*, B. would have had an *estate tail*, with a fee expectant thereon^v. Here the habendum does not alter the estate tail in the premises, but only adds an expectant fee to it. But to say that in the other case cestuique use shall have a *fee*, when the feoffee has only *seisin* for a *fee tail*, is to me a refined construction upon the statute, which I do not clearly comprehend. What says the statute? "The *estate, title, right, and possession*, that was in such person or persons, &c. be from henceforth clearly deemed and adjudged to be in him or them that have, &c." Now if in the case above put, cestuique use should have a *fee simple* descendible to his *heirs general* executed by the statute, when the possession and estate of the feoffee (out of which the uses are served) is only an *estate tail* descendible to *particular heirs*, then it is very certain that *cestuique use* has neither the *estate, title, right,*
or

or *same possession* of the feoffee, as required by the statute, but an estate differing in its *nature* and *title* from it; the estate of the feoffee only marking the *continuance* of that of the cestuique use. It rather appears, from the words of the statute, that cestuique use would have the *estate* and *title* of the feoffee, which is but an estate tail. The seisin of the feoffee cannot serve the use in fee: in the same manner as if an estate was limited to A. for *life*, to the use of C. *in fee*, here C. has clearly but a *life estate*, though the use is declared *in fee* ^w. And there is no incon- ^v Vaugh. 49: sistency in making the construction above-mentioned, for then C. would have an estate tail to the heirs of his body; which is the same with an estate tail limited to one, and the heirs of his body absolutely ^x. However, as ^x Vide 3 Cha. these observations are certainly liable to ob- ^{Ca. 17.} jections, I must solicit the indulgence of the learned reader.

But admitting that a tenant in tail cannot be seised to a use according to strict legal notions; yet if lands were to be devised or conveyed to a man in tail, to the use or in trust for another person, or to do any particular act, this would be a *trust*, the performance of which equity would enforce ^y: ^y Vide for *trusts* are the mere creatures of equity, ^{1 Vern. 411.} which would never allow them to fail on ^{vide 3 Atk. 549.} account of any disability in the trustee; for ^{where an infant trustee in tail was decreed to convey by common recovery.} it is a rule in equity, that every cestuique ^{Vide supra, 89.} trust, whether a volunteer or not, with or without consideration, is entitled to the *aid* ^{3. P. W. 222.} of the court, in order to avail himself of the benefit of his trust ^z. Therefore, we see in ^{some}

* Vide
2 Cha. Ca.
130, 131.

^b 1 Brown,
Cha. Rep. 81.
vide Earl of
Kildare v. Eu-
stace. 1 Vern.
439. where the
master of the
rolls was of
opinion that the
king might be
a trustee.

* Vide
Hob. 136.
2 Vern. 412,
454.

some instances, that where a trustee has been incapable, through some legal disability, to convey or execute an estate, the court of chancery has removed him out of the trust^a. Indeed, a principal rule, which equity has adopted with respect to trusts, is, that a *trust* shall never fail on account of the deficiency of a *trustee*; and that court seems to be guided more by the *intent*, in *raising* and *fastening* the trust on the estate, than on account of any ability or disability of the trustee. Therefore, whenever there is a defective or improper trustee, chancery acts as if there were no trustee at all, in which case the person who executed the trust, and his heirs, would be trustees themselves. Thus, in a late case ^b, a testator devised an estate to a *corporation* in trust for particular uses: now a corporation could not take as trustees, on account of the statutes of mortmain; neither could they stand seised to uses by the common law: therefore it was held, that the trust was sufficiently raised to *fasten* itself upon the estate, and that it should be as if no trustee were named; in which case the heir at law would become trustee to the uses of the will. However, with respect to corporations, we frequently find that devises to them in *trust* for charities are held good, and that the corporations become thereby trustees for the charities. This is allowed by the equity of 43 Eliza. c. 4. s. 1. notwithstanding it is void by the statutes of mortmain^c. We shall have occasion to make some further remarks on the nature of *trusts* and *trustees*. But to return to the statute of uses; there
must

must be, as was before noticed, a *consideration* to raise, or declaration of a use; a person capable of standing seised to, and of receiving, a use; and there must be a proper hereditament, out of which it may be raised, before any use can be properly executed by the statute.

As the statute mentions the words *use*, *confidence*, or *trust*, it seems to execute the possession to the use, whether expressed in any of those words. Thus, if a man *conveys* or *devises* in fee, in *trust* for B. or in trust that B. shall take the profits, this is a use executed in B by the statute: or if an estate is limited to J. S. and his heirs, in trust that J. A. shall take the profits during his life, this is also a use executed by the statute ^d. So in the case of Broughton and Langley ^e lands were devised to trustees and their heirs, in trust to permit A. to take the profits during his life, and afterwards the trustees were to stand seised to the use of the heirs of the body of A.; and it was held that the statute executed the use in A. for life, by which construction he had an estate tail executed in him.

It is said, that in all cases, where a use might have been raised by the common law, and was formerly compellable to be performed by the chancery, the use shall be now executed by 27 H. 8. ^f Thus, where A. *granted* and *devised* the reversion after an estate for life, it was held that the reversion passed by way of use by virtue of the word *grant*, and consequently no *attornment* was necessary, for the word *grant* was sufficient

^d Skin. 209.
^e Prec. Cha. 345.
^f 2 Salk. 679.
¹ Lutw. 823.
S. C.

¹ 2 Brownl.

²⁹¹.

to pass the *use*; and as the chancery would have compelled the execution of it, so the statute now executes it^g. Besides the words mentioned in the statute, the word *intent* will also raise a use; therefore, where a man made a feoffment in fee *sub conditione, ea intentione*, that his wife should have the land for life, remainder to his younger son in fee, the feoffor died, as did also the feoffee without making any estate. The heir of the feoffor entered as for a condition broken; but it was resolved, that this was *no condition*, but an estate executed presently by the statute, according to the *intent* of the parties^h. So in a similar caseⁱ, where a man made an absolute feoffment in fee; but there was a deed of defeazance made at the same time with the feoffment, which gave the feoffor, and his heirs, a power of entry after quiet enjoyment by the feoffees for 100 years, and after the 100 years had elapsed it was held by the judges, that the lands were vested in the heir of the feoffor by 27 H. 8. for that it appeared to be the *intent* of the feoffor, that he should have the lands again after the 100 years possession by the feoffees. This *intent* was the *use* of the feoffment, which arose out of the possession of the feoffees, and was executed by the statute of uses.

According to the construction placed on the above cases, it appears, that the courts have been willing not only to rectify, but annihilate uses. However, on account of some legal scruples and equitable decisions, the above observations have some exceptions, which

^g 2 Mod. 252,
253.
Vide *supra*, 17,
18.

^h 4 Leon. 2.
pl. 3.
ⁱ Moor, 722,
723. pl. 1009.

which will be better understood when we come to speak of such cases as are out of the statute. I shall only here remark, in addition to what has been said, that though it be the *intention* of the parties, that the use *should change* from one person to another, yet if that *intention* is not expressed on a proper conveyance, or by sufficient words, or other legal requisites, the use will be deemed to remain as it originally was, and will not be executed to the person it was intended for. Thus ^k, where T. S. by indenture covenanted and granted, in consideration that A. B. had conveyed divers lands and tenements to him in fee simple, after the death of the said A. B. that he the said T. S. would levy a fine of other lands, whereof he stood seised, to the said T. S. for life, remainder to the said A. B. in tail; there was no fine levied, and it was held that this covenant to levy a fine did not change or raise any use, so as to cause it to be executed by the statute. Here we see only a *covenant* to make a conveyance, which *covenant* was not like a covenant to stand seised, or indeed like any other conveyance; for in effect it was nothing more than a *covenant* to make a *conveyance*, out of which uses would arise: and until that conveyance was made, the uses remained as they were before.

* Dyer, 96. a.

Vide Croffing
v Scudamore.
1 Vent. 137.

Upon the principles of this case it has been held by more modern resolutions, that *articles* entered into before marriage to settle lands to certain uses, do not raise any uses till a conveyance is made to create those uses according to the articles. Thus it has been held,

12 P. W. 436,
439, 447.
Edward v.
Freeman.
1 Eq. ab 387.
1 P. W. 622.

held, that where articles have been entered into to settle lands to certain uses, and before a settlement has been made pursuant to those articles, an actual conveyance to uses, different from those mentioned in the articles, has been made, the uses so raised by the conveyance should hold good against those *articled to be raised*¹. So too in the case of Trevor v. Trevor^m, where A. in consideration of an intended marriage, covenanted, promised, and granted, with trustees to settle lands to the use of himself for life, without impeachment of waste, then to the use of his intended wife for life, remainder to the use of the heirs male of the body of A. by his intended wife, and the heirs male of such heirs male issuing, remainder to the use of the heirs of A. for ever. A. covenanted, that until such assurance should be made to such uses, that he and his heirs would *stand seised* to the uses mentioned in the articles. There was no settlement made according to the articles, and several years afterwards A. levied a fine to other uses. Now the question was, whether the uses were properly raised by the articles, and the covenant to stand seised, so as to be executed in A. by which A. would have an estate tail executed in him. If that was the case, then the fine would have barred the issue in tail; and it was held by the lord chancellor, that the intention of the parties by the articles was, that A. should only have an estate for *life*, with remainder to the first and other sons in tail, that the chancery, in decreeing a conveyance to execute the uses, would preserve the intention: for the

the *articles* themselves did not raise any *uses*, so as to be executed by the statute; and as to the covenant to stand seised, *that* was only intended to raise *uses*, *until* such time as the *uses* intended to be created by the subsequent conveyance were well and truly raised; and though the covenant did raise the *uses*, till such time as the conveyance was made, yet when the conveyance should be made, it would overturn the *uses* under the covenant, and have relation to the time when the fine was levied. Of course it was decreed, that the fine levied by A. was void (he being only tenant *for life*) as to the barring the remainder to his son; and that a conveyance should be executed to the son of A. (A. being dead) and to the heirs male of his body. This last case not only shews us, that *uses* articulated or covenanted to be raised are not executed by the statute, but that chancery, in decreeing an execution of them, endeavours to preserve the *intention* of the parties, though contrary to the express words of the articles. To enter, however, into an enquiry concerning the prevailing doctrines of chancery, in decreeing an execution of articles, and *trusts*, does not seem applicable to this work. Indeed, Mr. Fearn, in his Treatise on Contingent Remainders, has handled that subject in so masterly a manner, that any further attempts to elucidate it would be fruitless. I shall only here observe, that all *uses*, when raised *before* the statute, were *executory*, because they were only to be executed by subpoena out of chancery. So that *before* the statute there were two kinds of *executory*

cutory *uses*; the one *already* raised, and the other only *articled* or *covenanted* to be raised. But the statute has now done away that distinction, as *uses*, when properly raised, are immediately executed. However, since the introduction of *trusts*, the same difference seems to prevail with respect to them; for they, like *uses* before the statute, are merely *executory*, even when they are properly created; for whenever they are *executed*, then they no longer continue *trusts*, but form a *legal* estate. They may also be *executory* before they are raised; as supposing *money* to be devised or articulated to be laid out in the purchase of lands, which, when purchased, should be settled to certain, and upon particular trusts; now, until the lands are purchased, neither the *uses* nor trusts can be raised: but still they are trusts *executory*, and the cestuique trust shall compel the trustees to purchase the lands^a. Lord Hardwicke therefore has very properly denied the distinction between trusts *executed*, and *executory*; holding that all *trusts* are, in the notion of the law, *executory*^b.

I shall now add a few more cases, to explain what conveyances or words are necessary to change, or transfer a use from one person to another. Thus, in the case of Wingfield and Littleton^c, where A. covenanted, that she would suffer a recovery to B. (her son) his heirs and assigns, to and for such uses, as in a subsequent indenture should be declared. B. covenanted that within eight months after the recovery suffered, he *would make* an estate to A. for life, remainder to

^a Vide 3 P. W.
211 to 229.
Lechmere v.
Carlisle.

^b 2 Atk. 583.

^c Dyer, 162. a.
also 166. a.

to B. and C. his wife in tail, remainder over in fee. The recovery was suffered accordingly; but no further declaration of the uses made. And it was held, that neither the recovery nor covenant of B. changed the use; for the recovery was to certain uses, and until those uses were properly declared (the covenant of B. to make estates not being a sufficient declaration of the uses) the use resulted back to the recoverer.

So where A. ⁹ seized in fee, covenanted ^{12 Roll. ab. 788.} with B. in consideration of a marriage to be had between J. S. and J. D. the son of the one, and daughter of the other, that certain lands should from and immediately after the death of A. *remain* and *be* unto the said J. D. and J. S. and to the heirs of the said J. D. to the *only use* of the said J. D. and J. S. and to the heirs of the said J. D. In this case, though the marriage took effect, yet no use arose by the covenant; it not being a covenant to stand seized; but only that the lands should *remain*. These cases all tend to prove that uses cannot be *executed*, before they are properly *raised*.

In addition to what has been said, concerning the execution of resulting uses by the statute, it may be observed, that a person may have a greater estate in a resulting use, after a recovery suffered, or fine levied, than he had before: and the statute will execute such greater estate. Thus a tenant in tail has but an estate tail both in the possession, and the use: but if he suffers a recovery, or levies a fine, without declaring any uses, the use will result to him *in fee*, and of course the
statute

² 9 Co. 8. c.
² Roll. ab. 789.

statute will execute it^r. It may also be noticed, that the statute of frauds, 29 Car. 2. which requires all declaration of *trusts* to be in writing, does not extend by express words, to uses and trusts arising by implication of law. Indeed it has been held, that as resulting uses are immediately executed by the statute, thereby becoming a legal estate, the statute of frauds did not intend to intermeddle with *legal* estates, but only with modern resulting trusts^s. However that may be, it is very certain that the doctrine of resulting uses, and trusts, is not at all restrained or affected by that statute.

¹ 1 P. W. 112,
¹ 13.
 vide 2 Vern.
 294, 295.

Rents may be conveyed to uses by the statute, as well as lands; and not only rents *in esse*, but also rents *de novo*. Thus a grant of a rent charge *de novo* for life to a certain use is good, notwithstanding there is no inheritance in being of the rent at the time of the grant^t. Indeed Perkins makes a distinction between the grants of rent charges *in esse*, and *de novo*. Upon grants of the former *in fee*, he says, that either a consideration, or express declaration, is necessary to raise the use; but in the latter, the use will be in the grantee without either^v.

¹ Ba. uses, 43.

⁷ Perk. f. 530,
 531.

The statute not only executes the use upon common law grants of rents, but, by the fifth clause, provides for the execution of rents, where any person or persons stand seised of lands to the intent that another person should receive a rent thereout. According then to this clause, if lands are limited to A. and his heirs, to the *use* and *intent* that B. and his heirs may receive a rent thereout; B. would

would have the legal estate in the rent executed in him by the statute. But if lands were limited to A. and his heirs, in trust to receive thereout a rent charge, and then the rent is declared to the use of B. and his heirs, here the legal estate of the rent is in A. ^w

^w 3 P. W. 229,

^{230.}
Chaplin. v.
Chaplin.

The rent, in these cases, should regularly be limited to arise out of the possession of the *recoverer*, *conusee*, &c. and not out of the possession of *cestuique use*; for in Cromwell's case, where a rent was limited to arise out of the possession of *cestuique use*, the Chief Justice Vaughan thought it to be a great strain against the true reason of the law ^x.

^x Vaugh. 52.

The case of Cromwell ^y, so far as it relates to the present point, was as follows: A recovery was covenanted to be suffered, wherein A. should be recoveree, and B. recoverer; to the uses and intents following, viz. to the use of C. and his heirs, *rendering* for the same a *rent* to A. (the recoveree) now the question in this case was, whether the rent to A. could be executed in him out of the possession of *cestuique use*, as executed by the statute? It was urged that the statute intended only to execute the rent out of the possession of the *recoverer*, and not out of that of *cestuique use*. Here, notwithstanding the use was first limited to C. and then the rent created; yet, as it appeared that the *intent* of the parties was, that A. should have the rent, it was held, that the rent was well executed by the statute.

^y 2 Co. 69. b.

Ibid. 72. b.

As the statute executes all rents *in fee*, or *for life*, or *years*, so it transfers all *remedies*, and rights *incident* thereto; but not *collateral* rights.

^a 2 Mod. 138. rights. Thus : where A. granted a rent charge to B. and C. in trust for M. ; *habendum* to them, their heirs, executors, administrators, and assigns, in trust for M. *for life*, with a clause of distress, and a covenant for payment of the rent to trustees, to the use of M. it was the opinion of the whole court, that as the rent charge was executed by the statute, so all rights, *incident* thereto, was transferred to *cestuique use* : and as the power of distraining was incident to the rent charge, it passed to the *cestuique use*. But the covenant for payment of the rent was collateral to the land, and was not transferred to *cestuique use*. This rent charge was executed by the *first* clause of the act, which transfers the estate, right, title, and possession, of the trustee ; but as to the *fifth* clause, concerning rents, it particularly gives to *cestuique use* the remedy of distress, and “ all other suits, entries, and remedies for such rents as if the same rents had been actually and really granted to them.”

On account of the words in the beginning of this clause, which are, “ where also divers persons *stand* and *be* seised of and in,” &c. there was a doubt whether the statute extended only to such rents as were *in being* at the time it was made ; or to such as were afterwards created ; but those words were held to be explained by some that followed, viz. “ were or *shall be* seised, &c.”

^a Dyer, 362. b. *Secondly*. What construction has been taken, after the use either *in fee simple*, *fee tail*, *for life*, or *years*, has been executed in *cestuique use* ? I have particularly mentioned the execution of uses in *fee simple*, *fee tail*, &c.

in contradistinction to uses executed in remainder, or reversion.

It is very obvious, that as the statute has made the estate of *cestuique use* a legal, instead of an *equitable* one; and entirely divested the feoffees of all estates whatever, many of the doctrines and incidents are now at an end, which attended the use when in its fiduciary state^b. With respect to the feoffee, he has^b 2 Comm. 333. no interest at all in the land, therefore it cannot on his account escheat, or be forfeited: nor be aliened nor subject either to dower or courtesy on account of his momentary seisin. On the contrary, it is subject to escheat, to courtesy, dower, &c. in consequence of the seisin of *cestuique use*, and in short, to all the incidents to which a legal estate is liable^c. But as lands were^c 1bid. not, till some time after the passing of that act, devisable, so *cestuique use*, who had then the legal estate, could not devise it^d.

^d Perk. 537,

538.

I proceed now more regularly to explain in what respect uses, executed by the statute, agree with the rules of the common law, and in what they differ. And first, with respect to the *limitation* or *creation* of estates. It may be laid down as a pretty general rule, that the same words necessary to limit an estate *in fee simple*, *fee tail*, &c. on a conveyance by the common law, are equally necessary since the statute on a conveyance to uses. It is true, that if before the statute a man had bargained and sold his lands without inserting the word *heirs* for a valuable consideration, chancery, which ever watches over the consci-

consciences of men, would have decreed an execution of the use *in fee*; because the consideration entitled the bargainee to have the *fee*^c. But as the statute now executes the use, and the bargainee has a *legal* estate, the same construction must be had upon this legal estate by the statute, as was put upon estates at the common law. Therefore, in the case put, the bargainee since the statute could only have an estate for life^f. Upon the same principles, if a man since the statute bargains and sells lands, or makes a feoffment, &c. to the use of another person, and his assigns, or to him *for ever*, in such cases the bargainee, &c. has but an estate for life, according to the rules of law^g. And it seems that if a man makes a feoffment to the use of B. and *his heirs male*, as this limitation would at common law have created a fee simple^h, so will it on a conveyance to uses create the same estateⁱ.

And in one very particular instance the courts have seemed unwilling to dispense with the strict legal notion of limitation on a feoffment to uses: thus at common law the clause of warranty was held not sufficiently powerful to *enlarge* the estate given by the habendum; that is, if an estate *for life* was gave by the *habendum*, and the feoffor warranted the lands to the feoffee, and *his heirs*, yet the feoffee would have had but an estate for life^k. So where A. in consideration of £.7,000, enfeoffed B. C. and D. for ever, with a clause of warranty to them and *their heirs in formâ prædictâ*; in this case we see that B. C. and D. have a seisin to the use of them.

^c 1 Co. 100. b.
^f 1 Co. 87. b.
^g Litt. f. 1.
^h Co. Litt. 27. b.
ⁱ Gilb. uses, 75.
^k Perk. f. 166.
cites 12 E. 3.
10 Co. 97. a.

themselves in *perpetuum*, which estate in the use, according to the doctrine of the common law, was but an estate for their lives. Then came the clause of warranty, which seemed to indicate an intention of giving the *fee*, by expressly mentioning the word *heirs*. But by the better opinion, it seemed to be held, that B. C. and D. had but an estate for their *lives*, by the express declaration of the use in *forma prædicta* ¹.

¹ Dyer, 169. a.

However, in some cases the law and manner both of *creating* and limiting estates, have undergone alterations since the introduction of conveyances to uses, quite contrary to the simple maxims of the common law. Thus it was *primâ facie* absurd that a man should make a conveyance, or give possession by livery of seisin to *himself*; and therefore if a man made a feoffment of his own land, unto himself and a stranger, the stranger took the whole, for a man could not enfeoff himself ^{m.} ^{b.} = Perk. 203.
But now if a man enfeoffs another to the use of himself, or to the use of himself and a stranger, this is a good limitation of the use, and the statute executes it in himself alone in the first instance, and in him and the stranger in the second ^{n.}. This manner of conveying ^{= Co. Litt. 22. b.} lands to one's self can be effected by a feoffment, fine, recovery, or lease and release; for in each of these conveyances the seisin is first given to the feoffee, &c.; and that seisin is sufficient to serve uses declared to the feoffor, &c. or any other person. But in a bargain and sale where the *use* first passes, and then the possession is executed in the bargainee, whereby he has an estate executed by the
K statute,

statute, no other use can be declared to the bargainor, according to the rule of law, that
 * Dyer, 155. a. a use cannot be limited to arise out of a use °.
 b. And yet a man may covenant to stand seised
 1 Co. 136. b. to the use of himself, as will appear hereafter
 137. a. more fully.

As a man could not at the common law convey to himself, so neither could he make his own right heir a purchaser. Thus, if a man had enfeoffed another for life, remainder to the heirs of the body of the feoffor, this remainder to the heirs of the body had been void^p. But it was held, that if a man had made a feoffment, levied a fine, suffered a recovery, or conveyed by lease and release, to A. in fee, to the use of A. *for life*, remainder to the heirs of the body of the grantor, this remainder was good^q. For here the grantor departed with the whole fee simple, and in fact he conveyed no possession to the heirs of his body, but gave the whole seisin in fee to the grantee; and only limited the *use* to the heirs of his body, which use was before the statute quite distinct from the possession, though indeed the statute has annexed the one to the other.

By this mode then of conveying to uses, many real conveniences are experienced, quite unknown to the rigid maxims of the common law. Men can now modulate their property so as to serve the contingencies of their families. A man, by first giving the seisin of land to certain persons in fee by a conveyance, which operates by way of transmutation of possession, may give himself an estate for life, remainder to his wife, or to his first son,

or

or may make himself tenant in tail, &c. or do any other acts suitable to his intention, and agreeable to the wishes of the parties.

Again: by the common law, generally speaking, no person could take a present interest by the *habendum* of the deed, who was not previously mentioned in the premises^r. ^{r 2 Roll. ab. 68.} But in *Samme's case*^s, where A. enfeoffed ^{Hob. 313.} B. *habendum* to the said B. and C. their ^{Note 4. to Har.} heirs and assigns, to the use and behoof of ^{Co. Litt. 26. b.} the said B. and C. their heirs and assigns; ^{* 13 Co. 59.} it was resolved, that as C. was not named in the premises, he could take no *possession* originally by the *habendum*, and that the livery, made according to the intent of the indenture, did not give any thing to C. because as to him it was void: but though the feoffment did not give any *seisin* to C. yet it did to B. and his heirs, which *seisin* was sufficient to serve the use declared to C. Therefore the use limited to B. and C. was good, and the statute executed it. But this limitation of the use to a person not named in the premises would be void in a bargain and sale for the reasons just before mentioned.

So it is a rule of law, that if an estate is limited to *two*, and the one is capable at the time of the grant, and the other incapable, the former shall take the whole^t. ^{t 1 Co. 100. b.} Thus a grant to a man and his first son unborn; the grantee, the father, took the whole, and the son could never take^v. But the law of uses^{v 2 Roll. ab.} has made an alteration in conveyances of this ^{417.} kind. Therefore, if A. makes a feoffment in fee to B. to the use of B. and his wife *that*

⁂ Moor, 96.

634.

Dyer, 274. b.

1 Co. 101. a.

⁂ Perk. f. 52.

⁂ Ba. uses, 61,

⁂ 2 Roll. ab.

791.

⁂ Co. Litt. 217.

a.

5 Co. 94. b.

2 Vent. 264.

shall be, and afterwards B. marries; now though the whole vested in B. at first, yet upon his marriage his wife takes jointly with him ^w. The use in this case first vests wholly in B. and upon his marriage it shifts to him and his wife: it therefore rather turns upon the doctrine of *secondary or shifting uses*, which I will endeavour to explain: I shall only premise, that by the common law, a grant to a person who, at the time of the grant, was incapable of taking, was utterly void; as if I made a grant of an annuity to the right heirs of J. S. who was then living, the grant was absolutely void ^x. But since the introduction of uses, if a feoffment is made to the use of the first son of the feoffor, which son is not born at the time of the feoffment, or to the use of the feoffor's wife *that shall be*, &c. this limitation of the use is good; for though the limitation of the use be to a person uncertain, and there is no particular estate of freehold limited before the grant, yet in order to support this limitation the law construes the use in the mean time to be in the feoffor ^y; but upon the happening of the contingency, then the use shifts from the feoffor to cestuique use ^z. Indeed another chief reason, why at common law the above species of grant was void, was, because no estate of freehold could be granted to commence *in futuro* ^a: as a grant to B. in fee to commence four years after the grant. But at the same time, if there had been any preceding estate of freehold granted to some person to support this future grant, that had been good. Thus if a grant had been made

to

to J. S. *for life*, remainder to the first son unborn, or right heirs of J. D.; or if a feoffment and livery had been made to J. S. for ten years, remainder to J. D. in fee; now though a grant to the first son, &c. of J. D. would have been void without the estate *for life* given to J. S. or the remainder to J. S. without the estate for years in the second instance; yet with the intervening estates the remainders were certainly good. The courts then, on conveyances to uses in order to support limitations where no particular estate is granted, have generally made a particular estate by implication; thereby establishing a maxim of equity, that so much of a use, as a man does not dispose of, remains with him; as a grant to the use of B. to commence four years from thence, is good: for 'till the expiration of the four years, the use results to the grantor^b: or if a man covenants to stand seised to the use of his own heirs of his body^c; or bargains and sells his lands after seven years^d; in each case the grant is good, and until it takes place, the use results. However, it has been said, that a feoffment to the use of the right heir of B. then living, was void^e. These things have been partly explained before^f. To what therefore has been said on that point, I shall only add, that the courts have not only countenanced resulting uses upon conveyances to uses, in order to support subsequent limitations where no particular estate has been limited; such as a conveyance to feoffees, releasees, &c. to the use of the feoffor's, releasor's, &c. intended wife, to his first son unborn, or to the heirs

of

^b 2 Salk. 675.^c Carth. 263.^d Ba. uses, 63.^e 1 Salk. 225.^f Supra. 128 to

138.

Co. Litt. 22. b.

23. a.

1 Mod. 161,

162.

1 Roll. Rep.

240.

2 Co. 91. b.

2 Vern. 370.
2 Freem. 231,
235, 258.

of his body (in which last case indeed we have seen that he has an estate tail executed in him) but they have also decreed resulting uses, where the use, previous to the limitation, has been limited away for a term of years. Thus in the case of Penhay and Hurrell ², where lands were conveyed to the use of trustees for seventy years, if A. should so long live, remainder to trustees for 500 years; and from and after the death of A, then to the use of B.; it was objected that the limitation to B. was void, it being a freehold to commence *in futuro*: for no estate for life was limited to A. and the remainder was to take effect before the determination of the term of 500 years. But the court held, that an estate for life resulted to A. which would support the limitation to B. In this case no use was limited to A. the grantor: and limiting the use of the term of years to the trustees was no proof of an intention that the use of the freehold should not result to A. in order to support the limitation to B. Supposing the term of 500 years had been made determinable on A.'s death, like the term of 70 years, then it seems that there would have been no necessity for an implied estate for life, resulting to the grantor; for the presumption, that A.'s life would not have exceeded the term, would of itself have supported the remainder to B. according to Chief Justice Hale's opinion, in the case of Weale and Lerver ^h. But as it was, the limitation to B. was not a remainder expectant on the determination of the term of 500 years; for it was to take effect, according to the limitation,

^h Pollex. 67.
Fearne, 13, 15.

tation, during the continuance of the term. But it appears that if the *use* of the term in the case of Penhay and Hurrell had been limited to A. then the construction would have been different. Thus in the case of Adams and Savageⁱ, where lands were conveyed by lease and release to trustees, and their heirs, to the *use* of A. the *releasor* for ninety-nine years, remainder to the use of the trustees for *twenty-five years*, remainder to the use of the heirs male of the body of A.; it was held that no use for life resulted to A. and consequently that the remainder to the heirs male of A. was void, there being no freehold estate previously limited to support it. So there can be no resulting use to a person, who has not the lands conveyed in his own right. Thus where husband and wife covenanted to levy a fine of the wife's land, to the use of the heirs of the body of the husband on the wife to be begotten, they had issue, and the wife died; it was held, that the limitation to the heirs of the body of the husband was void: for taking it as a remainder, it was void, there being no precedent estate of freehold to support it; for the husband could have no estate for life by implication, he being a stranger to the estate. All the cases put of grants of future or springing uses, have been on conveyances, which give the grantees a seisin to serve the future uses when they arise; and in the mean time to serve a resulting or declared use to the grantor: for when it happens, that the use cannot in the mean time result, and that there is no particular estate limited capable of supporting the springing or future use, then

ⁱ 2 Salk. 679.

^k 2 Salk. 675.

Davis v. Speed.

Vide other cases on this head.

¹ P. W. 359.

^{387.}

² Mod. 211.

^{207.}

Fearn, 32. 33.

then the limitation is void, as in the case of Adams and Savage, and Davis and Speed, before cited. But with respect to devises the case is far different; for in these there is no necessity that the devisor should part with a present seisin to serve an executory devise, when it comes in *esse*; for if a man devises a future estate to arise upon a contingency, as a devise to the heirs of J. S. when he shall have one, &c. the estate, in the mean time descends to the heir at law of the devisor¹. But it is not my intention to enter into the doctrine of executory devises.

In the case of Penhay and Hurrell, it came to be an objection, that though on a covenant to stand seised, there might be a resulting use to support a future use or remainder, yet on conveyances which operate by transmutation of possession, there could be no such resulting use. But by the opinions of the Lords Coke and Hale, and by the authority of the same case of Penhay and Hurrell, it seems that such resulting uses may be as well on a conveyance, which operates by transmutation of possession, as on a covenant to stand seised^m.

When a man makes a feoffment to the use of the heirs of his body, the law, we have seen, construes an estate for life to result to him in order to support the limitation to the heirs of his body; so that the feoffor has in him, on such a feoffment, since the statute, a legal estate tail executed in him; and this legal estate tail can only be barred by the usual modes of barring estates tail, viz. by fine or recovery. But if a man covenants to stand

¹ 1 Eq. ab. 186.

^m Co. Lit. 22. b. 23. a.

¹ Mod. 161,

162.

¹ Roll. Rep.

240.

stand seised to certain uses upon the event of such a marriage, or any other contingency, if before the contingency happens, the seisin out of which the uses are to arise is destroyed; that is, if there be no person who can stand seised to the uses, when the uses arise, they can never be executed. Therefore, if before marriage the covenantor (the use of the *fee* resulting to him till marriage, and not for *life*, as in a limitation to the heirs of his body, and he having the seisin in him to serve the future uses, in the same manner as a feoffee to uses) makes a feoffment in *fee* in *tail*, or for *life* (secus as to a lease for yearsⁿ) upon a good consideration, and without notice of the uses, the estates limited after the marriage will never arise^o.

ⁿ Cro. Jac. 168.

^o Vide Moor, 731, 732, 733- Cro. Eliz. 765.

The doctrine of shifting or secondary uses is principally occasioned by the strictness of two maxims of the common law. The first is, that where a man has once limited a *fee*, he can limit no farther estate upon it; or in other words, he cannot make that estate in *fee* cease as to one, and take effect by way of limitation on a contingent event as to another person. Thus, if a feoffment had been made in *fee*, with a proviso to make it cease as to the feoffee, and go over to a stranger, upon the payment of a certain sum, &c. this limitation was void^p. For as a remainder it could not take effect, a remainder being a *remnant* of an estate in lands or tenements *expectant* on a particular estate: and as a condition it was void; for no person can take advantage of a condition, but the grantor and his heirs. Therefore, it being neither a re-

^p Vide Dyer, 33. 4; 1 Co. 85. 4.

mainder

remainder nor a condition, the limitation over was void by the common law. It would be inconsistent to suppose that a remainder, which is the *remnant* of an estate in lands and tenements, could be limited after a grant of the whole fee. But the same inconsistency would not appear, if the remainder was limited after an estate *tail*, for *life* or years: but then the remainder, when limited after those estates, should by the rules of the common law wait their *regular determination* ^q. Therefore, the second maxim was, that where an estate was limited to a person in *tail*, or for *life*, upon a *condition* to make the estate cease upon a contingent event, and to make it pass to a stranger before its regular determination: this condition was void; for it was not a remainder, it not waiting the determination, but being in abridgment of the particular estate: and it was void as a condition to vest the remainder by the entry of the grantor; for supposing the grantor to enter for a condition broken, such entry would avoid the first livery, and of course destroy the remainder, which was created by that livery. But both these rules have undergone alterations. With respect to the *latter*, if a man now limits an estate in fee to the *use* of A. in *tail*, or for *life*, until B. returns from Rome, and then to C. upon the return of B. from Rome, the limitation to C. will vest in abridgment of the preceding estate ^r.

^q Fearn 10 to 18. 4th ed.

^r Butl. note 1. Co. Litt. 203. b.

It seems to me, however, that a difference should be made between those cases, where the grantor only parts in the first instance

instance with an estate *less* than the *fee*, such as a plain gift in *tail*, or lease *for life*; and those, where the grantor departs with the *whole fee*, thereby transferring a seisin to the grantee to serve uses limited to create particular estates: such as a feoffment in *fee*. to the use of B. in *tail*, or *for life*, provided, when C. returns from Rome, it shall then be to the use of C. &c. For in the *former* case, in order to make the estate cease before its regularly and legally appointed period, and go over to another, there should be regular words of limitation, expressive of the intention of the parties; in which case the remainder is said to take effect by way of *conditional limitation*. The words of limitation are *so long*, *while*, or *until*^s. When these words are used, then immediately upon the contingency happening, the estate of the grantee ceases, and the next subsequent estate vests. But if mere words of *condition* are used, then the estate limited upon such condition to go to a third person will be void as a remainder, and as a conditional limitation. These words of condition are generally *upon condition*, *so that*, or *provided*^t. Therefore, if a lease *for life* is made *upon condition*, that if a stranger pay the lessor £. 20, then *immediately* the land shall remain to the stranger^v. This, as a *condition* to give the stranger entry, is void—as a remainder it is void, being in abridgment of the particular estate—there being also express words of *condition*, it can not enure as a *conditional limitation*—and as a *springing use*, it can never arise; for to create a *springing use*, there should be a sufficient seisin

^s 10 Co. 41. b.
Co. Litt. 214. b.

^t 10 Co. 41. b.

^v Plowd. 29. b.

seisin in some one to serve it, when it comes *in esse* : but here there is no seisin to serve the shifting use; for the lessee has only a seisin to serve the use implied to himself, and when his estate for *life* is determined, the seisin to serve the uses is determined also. But if a feoffment had been made *in fee* to the use of A. *for life*, and if B. does such a thing, then to the use of B. in fee, the use to B. may well take effect in abridgment of the estate for life of A.^w

^w 2 Leon. 16.

That, even at the common law, without the assistance of *springing* or *shifting uses*, an estate *tail*, or *for life* (without a seisin in fee to serve such use in *tail*, or *for life*, being first limited) might be limited to cease before its natural legal expiration, and go over to a stranger upon such cessure (which it could not do by way of a condition, and a remainder limited thereon) is a point well explained in the case of Foy v. Hyrd^x, where it is resolved, that if there be tenant for *life*, remainder in fee, upon *condition* that tenant for life, being a *feme sole*, should continue unmarried, and she afterwards marry, though the heir may enter, yet he thereby (by such entry) defeats the remainder. But if an estate is made *so long* as A. should continue unmarried, remainder to a stranger, upon the marriage of A. her estate ceases, and the remainder takes effect. So if a gift in *tail* is made, remainder over, *provided* if tenant in *tail* goes to Rome, his estate shall cease and determine; here if the donee goes to Rome his estate shall *not* cease. But if an estate *tail* is given to B. *while* C. goes to or returns from

^x W. Jones, 58.
Vide
Co. Litt. 214. b.
Cro. Eliz. 360.

from Rome, remainder to a stranger, upon the happening of either of the contingencies the estate *tail* will *cease*, and the remainder take effect.

If then an estate *tail*, or for *life*, is created (without first limiting the whole fee, and then declaring the *use* in *tail*, or for *life*) and such estate *tail*, or for *life*, is intended to cease as to one, and to take effect as to another, proper words of *limitation* should be used. But the change of the estates in this case does not operate by way of a *springing* or *shifting use*; not only because, *before* the statute, a use could not be limited to arise out of the seisin of a tenant in *tail*, or for *life*, but because this kind of *conditional limitations*, when operating by way of *shifting* or *secondary uses*, take effect, whether the words, which cause their taking effect, be words of *limitation* or *condition*. But in these cases it is necessary to limit the whole fee. Thus, if a feoffment is made in *fee* to the *use* of J. S. in *fee*, in *tail*, or for *life*, *provided* or *upon condition*, that if B. returns from Rome, that then the *use* shall be to C. or from thenceforth to the use of C. in this case upon the return of B. the use will shift to C.¹ This remark is further warranted by another case², where A. levied a fine to, and to the use of B. in *fee*, *upon condition* that B. should pay A. £.4. per annum, and in default of payment, to the use of A. for *life*; it was held, that as this was limited to the *conu- sor*, it was a condition; but if it had been limited to a *stranger*, it would have been a *good springing use* upon the non-performance of

¹ 3 Co. 20. a.
Butt note 1.
Co. Litt. 203. b.
² Cro. Eliz. 658.

^aPlowd. 421.
Moor, 99.
pl. 243.

of the condition. To prove this, the case of Bracebridge^a was cited, which so far as it relates to the present point was, that A. seised of the reversion of some lands, granted them to B. and C. and their heirs, to the *use* of them and their heirs, *upon condition* to pay a certain sum on a certain day; in default of which they should stand seised to certain uses: default was made, and it was held, that by virtue of the 27 H. 8. c. 10. the use was divested out of the grantees.

With respect to the first maxim of the common law above alluded to, that *a fee* cannot be limited on *a fee*, the doctrine of uses has made a great alteration therein. I shall only cite a few of the leading cases on this point, which will at the same time confirm the remarks just made.

^bBro. feoff. al.
uses, pl. 30.
cites 6 E. 6.
B.N.C. pl. 423.

The most known and celebrated case is, that cited from Brooke's Abridgment^b, where it is said, if a man makes a feoffment in fee to the use of W. and his heirs, until A. pays a certain sum to W. and then to the use of A. and his heirs, the use is first executed in W. by the statute, and then A. pays the money: the use upon such payment is shifted from W. and vested in A. But it is said to be the most prudent method for A. when the future use comes in *esse*, to enter in the name of the feoffees, and his own name; otherwise there may be a doubt, whether the use would change without such entry.

^c1 Roll. ab. 415.

So in the case of Spring v. Cæsar^c, a fine was levied to the use of A. and his heirs, if R. should not pay a certain sum to A. before an appointed time, and if he should, then

then to the use of A. for life, remainder to the use of R. in fee; upon the payment of the money it was held, that the uses would change according to the limitation.

In the case of *Lloyd v. Carew* ^d, A. and B. ^{d Prec. Cha. 74. Show. Ca. Par. 137.} two sisters, seised of lands in fee, in consideration of a sum of money paid to A. and an intended marriage between B. and C. by lease and release conveyed all their lands to the use of B. and C. for their lives, remainder to their first and other sons in tail male, remainder to the daughters in tail, remainder to C. in fee: *Provided* that if there be no issue between B. and C. living at the death of the survivor of them, and that the heirs of B. should within twelve months after the death of B. and C. dying without issue, pay the heirs and assigns of C. £.4000, then the remainder in fee, so limited to C. and his heirs, should cease, and that then the premises should remain to the right heirs of B. for ever. B. and C. levied a fine to the use of C. in order to extinguish the springing use to the heirs of B. After the death of B. and C. upon a dispute between the heir of B. and the heir of C. it was determined in parliament, that the fine did not bar the proviso; for that the land never was, nor could be, in B. who levied it: and that the proviso was within the reason of the Duke of Norfolk's case, where it is said, that future interests, springing trusts, or trusts executory, and remainders, that are to arise upon contingencies, are quite out of the rule, and reason of perpetuities, if they are not of re-
mote

mote consideration, but such as will speedily wear out.

Secondary uses will also arise, though the estate upon which the uses are limited to arise does not take effect. Thus it was said by the Lord Dyer, that if A. makes a feoffment in fee of a manor, part of which is in lease for years, to the use of the feoffee and his heirs, upon condition that the feoffee within ten days pay to the feoffor £.1000, and if he fail, then to the use of the feoffor for life; remainder to the use of his first son in tail, the money is not paid, and then the lessee attorns (after the ten days) to the feoffee: this attornment is good to raise the secondary uses, though the first uses did not take effect for want of such attornment before ^e.

^e 2 Leon. 222.

These cases will serve to shew the nature of shifting or secondary uses. Those who wish to see further into the cases on this subject, are referred to those (amongst others) cited in the margin ^f.

^f Dyer 314. a. b.

300. b.

Moor, 99.

pl. 243.

731. pl. 1018.

742. pl. 1022.

Where a person grants the whole *fee* away, determinable upon a contingent event by way of shifting use, there the shifting use, it seems, cannot be barred. Thus, if lands are given to the use of A. and his heirs, until B. pays him £.10, and then to the use of B. A. cannot bar this contingent use ^g.

^g Pig. Rec. 134.

Palm. 132. 135.

Vide Bro. feoff.

a^l. uses, pl. 50.

B. N. C. 137.

Note 1. Butl.

Co. Litt. 271. b.

under fol.

274. a. b.

Therefore, a contingent or shifting use in this respect differs from a contingent remainder, which may be barred, as will be shewn hereafter. But this limitation of a shifting use on a deed agrees with an *executory devise* after a previous devise of the fee, as was determined in the case of Pells and Browne ^a. How-

^a Cro. Jac. 590.

1 Eq. ab. 187.

ever,

ever, in a case^b, where a fine was covenanted to be levied, and afterwards levied accordingly to the use of the covenantor, till a marriage was solemnized between A. and B. and then to A. for life, with many remainders over: Before the marriage, and consequently before the vesting of the springing uses, the covenantor, being seised in fee, devised portions for his daughters out of these lands, and died, and then the marriage took effect: it was held, that though the devised portions could not, yet a devise of the land itself would have barred the shifting uses. So in the case of Wood and Reynolds^c it was held, that if a man covenants to stand seised to the use of himself in fee, till such a marriage, and then to other contingent uses, he may destroy these shifting or contingent uses before they arise, by making a feoffment in fee, in *tail*, or *for life*, upon a good consideration, and without notice: but that a lease for years would be insufficient for that purpose^d.

^b Moor, 731.
pl. 1018.

^c Cro. Eliz.
764, 765.
Gilb. uses, 129.

^d Cro. Jac. 169.
sed vide Moor,
742. pl. 1022.

We must reconcile these two last cases to the preceding rule in this manner; if the seisin, out of which the springing or future use is to take effect, is destroyed, the future use cannot take effect: therefore if A. covenants to stand seised to the use of such a wife, as he shall hereafter marry, until the marriage the use results to himself in fee, and it is out of his seisin that the use to the wife is to be served: Now, if he destroys that seisin, before the use comes *in esse*, the use, when it arises, cannot be served^e. But if A. makes a feoffment to B. in fee, to the use of C. in fee;

^e Vide Moor,
731, 732, 733.
Cro. Eliz. 765.

fee; but if D. pays so much money, then to A. in fee; here if C. (who has the legal estate since the statute) makes a feoffment, suffers a recovery, &c. the use to A. is not barred from taking effect; because that shifting use is served out of the seisin of B. the feoffee, and not out of the estate of cestuique use. For which reasons, the case reported by *B. N. C. 137.* Brooke^f, which is against this doctrine, has been denied to be law^g.
2 Sid. 98.

It is a general rule, that where an estate tail is given, and a secondary or shifting use is limited thereon, that the tenant in tail by recovery may bar the limitation over^h. Thus if there be a limitation of an estate tail, so long as such a tree shall stand; tenant in tail may bar this limitation by a common recovery, or fineⁱ. The same rule holds with regard to a limitation of a secondary fee, or shifting use upon a *devise* in tail. Thus in the case of Page and Hayward^k, A. devised to his daughter B. and the heirs male of her body, upon condition, and provided she intermarry with, and have issue by C.; and in default thereof, remainder over: A. and D. her husband suffered a recovery; and it was held that the recovery barred the limitation over.
1 Mod. 111.

Where a *fee* is given, or devised, with a shifting use, or secondary fee limited thereon, this shifting use, or secondary fee, must be expressly limited to take effect within the compass of a life or lives in being, and twenty-one years after, otherwise it will come within the reasons of a perpetuity, as has been determined by several cases^l. This limita-
2 Salk. 570.
vide 1 Lev. 35.
2 Sid. 102.
1 Vide 3 Cha. ca. 49, 50.
Precc. Cha. 72.
1 Eq. ab. 188.
c. 11.
Ca. Temp.
Talb. 228.

limitation of time beyond a life or lives in being, is not, as Mr. Hargrave^m properly observes, arbitrarily prescribed; therefore in the case of a posthumous child, it may be extended to a few months beyond the space of twenty-one years. But here we must make a distinction, when the whole *fee* is first limited away with a shifting use, or secondary fee thereon, and when the limitation is in *tail*. In the former case, we have seen that the shifting use must be *expressly* confined to the period of a *life* or *lives* in *being*, and a few months over, because as these kind of shifting uses are not barrable by recovery, they would tend to a perpetuity. Thus^a, if an estate is limited to A. and *his heirs*, and if B. (a person then in *esse*) dies without leaving any issue *living* at his decease, or if, having such issue, all of them should die without having attained the age of twenty-one years, then to C. and his heirs; this limitation to C. is good, because not limited after a total failure of heirs, or heirs of the body of B. But if an estate is limited to A. for *life*, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of A. in tail, remainder over, with a proviso that if B. dies, and there should be a total failure of heirs, or heirs of the body of B. then the uses limited to A. and his sons should cease, and the lands remain to C.; this limitation to C. is good, because when the first tenant in tail comes into possession, he may bar it by a common recovery, and therefore there is no danger of a perpetuity.

^m Har. note 5.
Co. Litt. 2. 1. a.

^a Butl. note, 1.
Co. Litt. 271. b.
under fol. 274. b.

In cases where a shifting use depends upon the performance of a condition, which is illegal, or fraudulent, the statute will not execute the use, upon the performance of the condition. Thus, if there be a limitation to the use of A. and his heirs, provided that if he give a mortal blow to any person, that the use shall cease as to him, and remain to another; this is fraudulent to prevent an escheat, and therefore is void^a.

^a Moor, 633.

Another observation occurs, that all future and shifting uses should be limited to arise out of the estate of the *feoffees*, *conusees*, *releasees*, &c. and not out of the estate of *cestuique use*; for if it is limited out of the estate of *cestuique use*, then it would be a use arising out of a use^b: whereas there is always a supposed possibility of estate in the *feoffees*, *releasees*, &c. to serve these future uses, when they come *in esse*. Therefore if A. enfeoffs B. in fee, to the use of C. and his heirs, with a proviso, that if D. pays C. £.100, that then C. and his heirs shall stand seised to the use of D. and his heirs, this limitation to D. is utterly void: for it ought to arise out of the estate of B. the *feoffee*, and not out of the estate of C. the *cestuique use*^c. But here we are to distinguish between this case, and one where the *cestuique use* *covenants* to stand seised to a use, on the performance of a certain condition. Thus^d, where A. bargained and sold his lands to B. who covenanted, that if A. paid to B. and his heirs £.20 by such a day, that then B. should stand seised to the use of A. and his heirs; it was held by the Lord Dyer, that upon

^b 1 Co. 136. b.
Co. Litt. 271. b.

^c 1 Co. 137. a.

^d Moor, 35. pl.
115.

payment

payment of the £.20 the use would be well raised to A. but that a *tender* of the money was insufficient for that purpose; and that if a feoffment had been made with such a condition, that a tender alone would have been sufficient to raise the use.

In the case of *Holloway v. Pollard**, A. ^{Moore, 761. pl. 1054.} bargained and sold land to B. for £.500, upon condition that if A. paid B. £500, he might re-enter, and be seised to the use of himself, and his heirs, *until* he should attempt to alien without the assent of B. and then to the use of B. and his heirs: a fine was levied to those uses; A. paid the £.500, and entered: afterwards A. aliened without the assent of B. It was held that no use arose to B. the bargainee upon the alienation of A. because the bargainer, entering for the condition, was in of the *old use* and estate, and could not be seised to any other use; also the fine was levied to B.; by which A., who was the conusor and also bargainer, and who came in according to the limitation of the use of the fine, could not stand seised to any other use; for if he could, then there would be a use arising out of a use.

With respect to the limitation of *remainders* in use since the statute (distinguishing between *remainders* and future or shifting uses) they now follow the rules and reasons of estates, executed in possession by the common law: ^{1 Co. 137. b. 138. a.} for though *before* the statute, if a feoffment ^{6 Co. 34. a.} had been made to the use of A. *for years*, remainder to the right heirs of B. this limitation had been good; because the freehold was in the feoffees. But since the statute, ^{1 Co. 135. a.}

¶ 1 Co. 130. a.
134. b.

as the *possession* is transferred to the *use*, no such limitation can be valid; and the remainder to the right heirs would be utterly void. This is owing to the necessity, which there is at the common law, for a freehold to support a contingent remainder.

I trust, I have now explained how, and in what cases, the creation and limitation of estates by way of *use* since the statute agree with, and differ from the antient common law mode of limiting and creating estates. I shall now proceed to shew what alterations the learning of uses has made in the antient laws relative to *remitter*.

¶ Litt. f. 660.

It is not my intention here to enter into a discussion of the laws of *remitter*, as they stood at the common law. I shall only premise, that by the common law, if tenant *in tail* had enfeoffed his son in fee, which son at the time of the feoffment was within age, and the tenant in tail died; and the son, to whom the feoffment was made, had entered as heir *in tail*, he would have been remitted to his former estate*. But since the statute, if tenant in tail makes a feoffment in fee to the *use* of his issue being within age, and to his heirs, and then dies; and the right of the estate tail descends to the issue, being within age; still the issue shall not be remitted; for the issue has the *use* in *fee* by the feoffment, and then the statute executes it in such manner, and plight, as it was first limited. But in this case, if the issue waves the possession, and brings a *formedon* in the *descender*, and recovers against the feoffees, he shall be remitted. ¶

¶ Co. Litt. 348.
b.

In

In the example just put, the *entry* of the issue was not lawful, for the estate tail was discontinued by the feoffment; therefore it is a kind of general rule, that if an *infant*, or a *woman*, having right of lands *discontinued*, wherein *entry* is not lawful, if the same infant or feme covert comes to that land by way of *use* raised out of the estate, the first taker shall not be remitted^a; the case of the issue in tail is an instance to this rule. So in Amy Townsend's case^a, where tenant in tail, in right of his wife, made a feoffment in fee to the use of his wife; remainder to his son and heir apparent in fee. The feoffor and his wife died; and it was held, that neither the wife nor the heir in tail was remitted. However, though the *first taker* is not remitted, as in the case of the issue put by Lord Coke, yet it seems the issue of that issue, or the one in remainder after the first taker, shall be remitted^b.

Amy Townsend's case was not helped by the 32 Hen. 8. the feoffment being made before that statute^c. The 32 Hen. 8. c. 28. gives the wife an entry against the husband's fine, or feoffment. The case, therefore, of Duncombe v. Wingfield^d has very much cleared the law, relative to remitters; So far as is necessary to our present consideration, it was thus: A. and B. his wife, being seised in fee in right of B. levied a fine with proclamations to the use of them two, and the heirs of their two bodies begotten, remainder to J. S. for life, remainder to W. in tail, remainder to B. (the wife) in fee; afterwards A, alone

^a Hob. 255.^a Dyer, 54. a. b.
Plowd. 111.
116.^b Co. Litt. 348.^b Dyer, 54. b.^c Plowd. 112.
Dyer, 54. a.^d Hob. 254.
Vide 8 Co. 71. b.
Dyer, 191. b.

alone levied another fine with proclamations to the use of himself and wife in special tail as before, remainder to himself in tail, remainder to himself, and E. M. in fee, B. died without issue, and then A. died. Upon this state of the case, three material points were settled. The first point was, that where husband and wife are tenants in special tail, and the husband discontinues by fine or feoffment, and takes back an estate in special tail to himself and wife, the wife is *ipso facto* remitted, and of course the husband; though it is true the husband is so far bound by his own act, that he cannot claim it in his own person. That in Amy Townsend's case the right of the wife was not within the saving of the statute of uses, and of course she was not remitted against the express words of that statute: but that the 32 Hen. 8. had changed the reason of that case, so that now, the use being raised to the wife out of the estate created by the fine, she is not in of an estate *discontinued*, but of an estate whereupon she might enter after her husband's death; and that a right of entry was sufficient to support her remitter, without an actual entry. That it was true the fine of the husband alone finally and totally barred the issues in tail, and therefore differed from a feoffment at the common law, yet the entail, which is barred to the issues, remained notwithstanding the fine to the wife in right, and as to all estates and remainders depending upon it, and to all the consequences of benefit to herself, and to others by her, as long as she lived, as amply
and

Vide Dyer,
351. b.
9 Co. : 40. a.

and beneficially as if the fine had not been levied.—2d point. As the husband and wife were both remitted to the first estate tail, of consequence J. S. and those in remainder expectant on that tail, were also remitted. But that upon the *death* of the *wife*, the remainders were dislodged, and turned into *rights*, as they were by the fine; and would have been if the wife had not been remitted. —As to the 3d point, it was held, that after the death of the wife, the remitter ceased, and the land returned again into the estate passed by the second fine; which estate continued during the life of the husband, and would continue as long as there was issue, if there had been any; for till then, those in remainder had no title to demand the land: but after the death of the husband and wife *without issue*, the entry of J. S. was lawful. In this case Lord Hobart held, that if after the death of the wife the husband had properly suffered a recovery, he would have barred all the remainders depending upon any of the estates. He also held in another place, in the same argument, that if the wife had survived the husband, and had suffered a recovery, it would have barred the remainder depending upon the first estate tail; but so long as there was issue living between them, the premises would go according to the estate passed by the second fine.

It is agreed by the determinations in the books, that if in the above case, the husband had made a *feoffment*, instead of levying a *fine*, that it would not have *barred*, but only have *discontinued* the right of the issue s. • 1 Lev. 49.
There- 1 Sid. 63.

Therefore, as the wife by her entry would have been remitted, so she would have purged the discontinuance, and restored the right of the issue, by restoring the discontinued estate tail. If too a tenant in tail makes a feoffment to the *use* of himself *in fee*, or if tenant in tail makes a feoffment to the use of himself *for life*, remainder to B. for *years*, and does not dispose of the reversion; in either case, the issue it seems is remitted, though the tenant in tail himself is not. In the second case, indeed, the issues may avoid the lease for years.

After what has been already remarked concerning the doctrine of uses, it is easy to perceive, that it has made some alterations in the law of *joint tenancy*. In cases of estates at common law a unity of *time* was absolutely necessary to create a joint tenancy; for joint tenants could not take at different periods. Thus, if a man made a feoffment to B. and his children, and their heirs (B. having no children) the children could not take^b: or if lands had been demised for life, remainder to the right heirs of B. and C. B. had issue and died, and then C. died leaving issue; yet the heirs of B. and C. should not be joint tenants, because one moiety vested at one time, and the other at another^c. Yet, it seems, if a feoffment had been made in fee, and the *uses* of it limited according to the limitation of the estates, in either of these cases there would have been a good joint tenancy created upon the falling in of either of the contingencies, according to the common case, that if a man enfeoffs another to the

^a 1 Roll. Rep. 260.

Moor, 846. pl.

1143.

B. N. C. 215.

8 Co. 72. a.

1 Lane, 93 to

96.

^b Co. Litt. 9. a.

^c Ibid. 188. a.

the use of B. and such a wife as he shall afterwards marry, though B. takes the whole at first, yet upon his marriage he becomes *joint tenant* with his wife ^k. So a disseisin to the use of two, and one agrees to it at one time, ^{13 Co. 48. 49.} and the other at another: this is a good joint ^{57.} tenancy ^{Dyer, 274. b.} ^{340.} ^{1 Co. 101. a.} ^{1 Co. Litt. 168.}

These are the principal observations, ^{a.} which occur to me with respect to uses ^{13 Co. 57.} executed in possession.—I proceed now to explain,

Thirdly, What that construction has been, when a use has been executed in remainder or reverter.

I have made this division, not because there is any thing that can be mentioned here, which could not have properly been included in the preceding remarks; but rather from a wish to follow the order of the statute. The particularity which the statute has shewn in first mentioning the execution of uses in *fee simple, fee tail, for life, and for years*, and then in *remainder and reversion*: its stopping at the words *remainder and reversion*, and not adding even the words *or otherwise*, are circumstances which, as Lord Bacon observes ^m, clearly indicate that the statute ^{m Ba. uses, 43.} did not mean to execute *inferior* uses, or in other words, it only intended to execute such uses as the feoffees might have executed by a conveyance. Therefore, it is now settled, that where any person is seised to a use in *possibility* or *contingency*, that use is not executed by the statute, as will be shewn, when we come to speak of uses in *contingency*.

With

With respect to the limitation of *remainders* out of the estate of the feoffees, we have seen that they follow the rules of the common law; and indeed sufficient has been said on that subject. I shall add a few rules respecting uses in *reversion*; for as remainders depend upon *particular estates*, and as reversions do *not*, they greatly differ. There is, however, a general rule, by which we may be guided in distinguishing the one from the other, viz. where a *particular use*, and the use limited upon that *particular use*, are both *new* uses; in this case the subsequent use is a *remainder*. But where the *particular use* is a *new use*, and the *remnant* of the use the *old use*, in this case the *old use* is the *reversion*ⁿ. Thus, by the common law, if a man had made a gift in tail, or lease for life, remainder to his own right heirs: now this remainder had been void; for it was a *remnant* of the *old estate*, and not a *remainder*^o. So if a man makes a feoffment in fee to *the use* of one for life, or in tail, remainder to the *use* of his own right heirs; in this case, though the whole fee is first limited, yet as only a *particular estate* in the use is limited away, and the *remnant* is limited to his own right heirs, this *remnant* is the *old use*, and therefore a *reversion*, and not a *remainder*^p. The consequence is, that the ancestor, though he has no *particular estate* limited to him, may encumber it as a *reversion*, though he could not do so, if his right heirs took by purchase. So if a feoffment is made by A. to the use of himself for years, remainder to B. in tail, remainder to the right heirs of A. this

* Ba. uses, 46.

• Co. Litt. 22. b.
Dyer, 156. a. b.
1 Roll. ab. 827.

• Co. Litt. 22. b.
Moor, 284.
pl. 437.

this is void as a *remainder* to the right heirs, but it is good as a reversion in A. which he may devise; for the use returned to the feoffor for want of a consideration to retain it in the feoffee, till the death of the feoffor ⁹.

¹ Har. note 3.
Co. L. 11. 22. b.
Moor, 371.
² Roll. ab 412.

In these cases we see the estate moved from the person, to whose right heirs the use was limited: but if it does not move from such person, then the limitation to the right heir is not a reversion, but a contingent remainder; provided such person takes only an estate for years, whilst the freehold to support the contingent remainder remains in another. Thus ¹, if a settlement is made by a third person to the use of A. the husband for ninety-nine years, remainder to trustees during the life of A. to support contingent remainders, remainder to the wife for life, remainder to the first and other sons of the marriage, remainder to the heirs of the body of the husband, remainder to the right heirs of the husband; this remainder to the right heirs of the husband is a contingent remainder, and not a reversion.

¹ P. W. 359.

Fourthly, *With respect to declaring uses*, we must first consider who may declare uses; and then the manner of declaring them.

The king may declare uses upon his letters patent, though indeed the patent of itself implies a use ². But if the king gives lands to J. S. and *his heirs* by letters patent, to the use of J. S. for *life*; here J. S. has only an estate for *life*, and the king has the inheritance without any office found: for implication

² Ba. uses, 66.

tion out of matter of record ever amounts to matter of record. The queen may also declare uses^t. An infant, or person of non-sane memory, may declare uses; which declaration of uses will continue valid as long as the conveyance, by which the uses are raised, remains of force^v. Therefore, if an infant makes a feoffment, levies a fine, or suffers a recovery, and makes a declaration of the uses, the uses will continue till the conveyance by feoffment, &c. is avoided^w. But a covenant by an infant, in consideration of marriage or blood, to stand seised to an use, is utterly void^x. A bargain and sale for a good consideration, previous to a fine being levied to the bargainee, is a good declaration of the uses of the fine^y. If *baron and feme*^z levy a fine of lands, of which they are seised in right of the feme, they may declare the uses of the fine *jointly*, or the baron *alone* may declare the uses, which declaration will bind the feme (although an infant^a) if her *disassent* does not appear. It must be noticed, however, that this declaration, which binds the wife, must relate to uses raised by conveyances of record, as fines and recoveries, and not by those in *pais*, as feoffments, &c.^b If husband and wife bargain and sell lands for money, and afterwards levy a fine to the bargainee and his heirs, the bargain and sale is a sufficient declaration of the use, and it will bind the wife for ever^c. And if a man, seised in right of his wife, covenants that he and his wife will suffer a recovery of the lands to certain uses, and the recovery is suffered accordingly; this covenant is a good declaration

^t Ibid.

^v 10 Co. 42. b.
Hob. 224.

^w Ba uses, 67.

^x Ibid.

^y Moor, 22.
pl. 73.

^z 2. Co. 57 a,
Moor, 22.
pl. 73.
Ibid. 197.

^a 2 Roll. ab.
798.

^b Gilb. uses.
244.

^c 2 Co. 57. a
Moor, 22.
pl. 73.

tion

tion of the uses to bind the wife, though she is no party to the covenant, but only to the recovery ^d. If in declaring the uses of a fine ^{d Dyer, 190. a.} or recovery, levied or suffered of lands, held in right of the wife, the husband and wife make separate declarations of the uses, neither of them can stand, and then it will be the same as if no declaration of the uses was made; in which case the use will result, and return to its former course, viz. to the feme, and her heirs ^e. But with respect to baron ^{e Moor. 197. pl. 347.} and feme, we must here make a distinction between a limitation of the use of *part* of the estate of the *land*, and the limitation of the use of part of the *land itself*. This distinction was made in Beckwith's case ^f. Thus, if ^{f 2 Co. 56. b. 58. a.} husband and wife differ in the limitation of the *particular use*, and the limitation of the uses in remainder are according to both of their consents; yet the whole of the uses are void. But if the husband and wife agree in the limitation of the use of part of the *land itself*, and vary in the limitation of the use of the residue of the land, yet the declaration is good for the part they agreed in, and void for the residue.

So if tenant for life, and remainder-man, levy a fine, or suffer a recovery, and the tenant for life only declares the uses, this declaration shall not affect the remainder-man ^{g. 3. P. W. 209.}. And if the remainder-man seals, and is party to a deed, wherein the tenant for life *alone* covenants to suffer a recovery, &c. to certain uses, this does not bind the remainder man, though he in remainder after join in suffering the

^a Note B.

³ P.W. 210,

¹ 2 Co. 58. 2.

the recovery, &c. ^b Joint tenants may each declare different uses with respect to their respective shares.

With respect to the *manner* of declaring uses, from what has been said concerning resulting uses, the necessity to make some declaration to shew the intention of the parties in the direction of the use seems very evident. As to the conveyances by feoffment, and lease and release, the uses are generally declared in the first instance upon the same deed, by which they are to arise: but as to fines and recoveries, the uses of them are declared either by deed *precedent* or *subsequent* to the levying of the former, or suffering the latter. After the passing of the statute 27. H. 8. c. 10. it became to be a questionable point, whether if a recovery was suffered, or fine levied, without any *previous* deed to declare the uses, any *subsequent* deed was sufficient to direct them? For it was thought, that upon suffering the recovery or levying the fine (no uses being previously declared) the use resulted back to the recoveree or conusor, which resulting use the statute immediately executed, as it certainly did: so that the use being once vested and executed by the statute, it could not be divested by any subsequent declaration. However, in Downman's case ^k it was held, that though the use resulted to the recoveree or conusor, *until* the subsequent declaration, yet when *that* was made the use was then executed, according to the direction of the declaration, and a deed to declare the uses made four years after the recovery was suffered, has been held to be good.

^a 9 Co. 7. b.

good^l. In the case of Nightingale and Ferrers^m, it is said, and indeed confirmed by the master of the rolls, that a very slight expression or words, though very improper, will serve to declare the uses of a fine and recovery, which require no set form of words for that purpose, but only something to shew the intent of the parties: therefore, whenever the *intent* of the parties can be collected in the limitation of the uses of a fine or recovery, upon any precedent or subsequent conveyance, or upon any covenant or expression in such conveyance, it is sufficient to declare the uses of the fine or recovery. It follows from the nature of a bargain and sale, and covenant to stand seised, that when the use is properly raised in the bargainee or covenantee, there can be no further declaration of the use. Therefore, when we speak of the declaration of uses, it must be understood as relating to such conveyances as operate by transmutation of possession.

If there had been a deed *precedent* before the statute of frauds to declare the uses of a recovery suffered, or fine levied, there could have been no averment by *parol* of any other uses, than what appeared on such precedent deedⁿ. But a *subsequent deed* or *writing* declaring different uses from those limited in the *precedent* deed, was held to be a sufficient alteration of the first uses. But this second deed must have been *before* the recovery was suffered, &c. for *after* the recovery was suffered, &c. the recoveree, &c. could by no means avoid the uses declared *before*^o. Though it seems indeed, that a deed *pre-*

^l Dyer, 126, a.^m Roll. ab. 782.ⁿ 3. P. W. 208.

Vide 2 Roll. ab.

789.

Hob 275.

Moor, 789.

pl. 1090.

^o 5 Co. 26. a.

9 Co. 10. b.

^p Moor, 107.

Pl. 249.

^r Dyer, 307. b.
pl. 71.

^q 5 Co. 26. a.
⁹ Co. 10. b.

^v Comb. 429,
430.
² Salk. 677.
⁵ Co. 26. a.

^a 2 Salk. 677.

^b 1 Atk. 7.
² Roll, ab. 799.

cedent may be *explained* by deed *subsequent* ^{v.} But herein they made a distinction, viz. if a recovery was suffered, or fine levied without any *previous* declaration of the uses, and then the uses were declared by a subsequent deed, the parties by *parol* might aver uses different from those in the original subsequent declaration ^{q.} But since the statute of frauds, which requires all declarations of trusts to be in writing, there can be no *parol* averment of a use. Subject to this statute, the rules relating to declaration of uses are pretty much the same as they formerly were. Therefore, if a declaration of uses be made *before* a recovery is suffered, or fine levied, and another declaration of uses is also made *before* the recovery, &c. by deed or writing, this last declaration will hold against the first ^r, because, till the recovery is suffered, or fine levied, the estate is but *directory*, and the last agreement of the parties will avail against the first. But when the estate is *executed*, then no averment of other uses by deed or writing can be admitted, contrary to the last deed precedent, provided the recovery is suffered or fine levied *pursuant* to the deed to lead the uses. But if the recovery or fine vary in circumstance from the precedent declaration of the uses, then other uses may be averred by *writing* without seal, and without a formal deed ^{a.} But though the fine does not agree with the precedent deed in circumstance, yet if there be no *other* deed or writing, the fine will remain to the uses in the first deed or writing ^{b.} If there be a recovery suffered, or fine levied, without a precedent deed to lead the uses, and after such

such suffering of the recovery, or levying the fine, a deed is made to declare the uses of them, it seems, that a subsequent deed or writing without seal will serve to alter the uses declared by the first deed, whether the first deed varies from the circumstances of such recovery or fine, or no^c. In these^c 2 Salk. 676. cases, where the two deeds to *declare* the uses differ only in particular circumstances, as the uses cannot be directed by both deeds, the first must be wholly avoided, and the second stand alone^d. ^d 2 Co. 26. a.

What has been said of one declaration of uses annulling another, must be understood, where both of them are by the *consent* of all parties. This was particularly settled in the case of Stapilton v. Stapilton^e, where all the foregoing rules are clearly acquiesced in. ^e 1 Atk. 2. A. was tenant for ninety-nine years, if he so long lived, remainder to trustees to support contingent remainders, remainder to the first and other sons of A. in tail, remainder to A. in fee. A. having two sons, B. and C. they all joined in a lease and release of the premises to certain uses, and there was a covenant to suffer a recovery within twelve months to those uses: afterwards they, with the heir of the surviving trustee, joined in a lease and release to make a tenant to the *præcipe*, in order to suffer a recovery to the uses of the first indenture; but before any recovery was suffered, B. the eldest son died, and after the death of B. and before the recovery was suffered pursuant to the above deeds, A. and C. by another deed covenanted to suffer a recovery to certain other uses; and

before the expiration of the twelve months specified in the *first* deed, a recovery was suffered. The question was, whether the first deed, declaring the uses of the recovery, and made by A. B. and C. should stand, in preference to that made by A. and C. alone? And Lord Hardwicke clearly held, that the first deed by A. B. and C. was a good deed to lead the uses of the recovery. That when A. B. and C. and the heir of the surviving trustee, made a tenant to the *præcipe*, they passed a defeasible estate to serve the uses of the first deed; and that the recovery suffered within the twelve months rendered that *defeasible* estate *indefeasible*, though one of the parties was dead before the recovery suffered. That the last deed by A. and C. was not sufficient to alter the uses declared by the first deed, because not made by the *agreement* of *all* the parties.

By the foregoing observations on declarations of uses, these precautions naturally occur, viz. that in deeds or writings, either to lead or declare the uses of a fine or recovery, all parties interested should join. That a deed *precedent* seems the most eligible, and certain; which, for the sake of safety, should be by *indenture*; and that the declaration of the uses should be certain in describing the persons to whom, the lands of which, and the estates by which, the uses are

^f Vide Shep. T. declared ^f.
494.

But here we are to observe, that when a conveyance is made to the use of a *last will* or *testament*, the use in such case is always *revocable*, like a will, during the life of the appointor.

pointor. Thus^s where A. suffered a recovery to the use of his last will; and upon a question whether, after a previous appointment of the uses according to the power, the uses limited by such appointment were revocable, or no, it was held, that whenever A. made any particular limitation, or disposition of the uses, whether by *last will*, or by *deed*, or *writing*, so long as he appointed that the recoverors, who were charged with the first uses, should stand seised to other uses, and builded his new limitation of uses upon the former foundation, (being the recovery) and as an explanation of his intention expressed other uses, in such case the said uses were always *revocable*, because they were grounded upon the first assurance, which was to the use of his last will, which was always subject to a change. It was also held, that until the appointment the recoveror stood seised to the use of A. the recoveree.

When there is a proper seisin conveyed to the grantee to serve uses declared upon it, it seems any expression indicative of the intention of the parties in directing the use (though the word *use* is not mentioned) will be a sufficient declaration of the use. Thus^h where a feoffment was made in consideration of marriage in these words, " I do here, *re-
serving an estate for my own and my wife's life,*
" give thee these my lands, to thee and thy
" heirs;" and according to the opinions of
Coke, Clench, Fenner, and Popham, it was
held in the King's Bench, that it was a good
feoffment to transfer a present seisin to the
feoffee, out of which a use should arise to the

^s Hob. 348.
Lord Ormond's
case.

^h Cro. Eliza.
344. Pl. 16.
Calliard v. Calliard.

¹ Roll. ab. 7.
pl. 7. 788.
² Moore, 687.
pl. 950.

the feoffor, and his wife; and the reservation, though it came before the feoffment, was a good declaration of the use: But Rolle¹ and Moore² tell us, that this judgment was reversed in the Exchequer Chamber: for the judges there held, that as the reservation came first, and consequently before the seisin could be passed to the feoffee, there was no possession in the feoffee, out of which the use could arise; of course the use could not arise for want of a seisin to serve it. And as a feoffment to commence after the death of the feoffor and his wife, it was also void; for no estate of freehold can be made to commence in *futuro*, by feoffment and livery of seisin immediately given thereon. So in a very late case³, where A. granted by lease and release a cottage, wherein he resided, to B. in *fee*, with a proviso that A. should *live in* and *occupy* the said cottage, with the appurtenances, as he theretofore had done, and then did, for *life*: it was held that an estate for life was well reserved to A. The decision of this case, I conceive, may be accounted for on two grounds. In the first place, as the reservation of the life estate came after the grant in fee, and of course after the grantee had a seisin to serve any uses, this reservation shewed the *intent* of the parties to reserve a life estate; now this *intent* might very well direct the use, so as to be executed by the statute⁴. On the other hand, as the conveyance by lease and release does not always, like a feoffment, pass a present seisin, it may very properly be made use of to pass a *reversion* after an estate for life⁵. However, with respect

³ 4 Term. Rep. 177.
The King against the inhabitants of Eastington.

⁴ Supra, 17, 18.
§ 55, 156.

⁵ Butl. note 3.
Co. Litt. 270. a.

respect to this latter reason, it is said in Plowden, that a man cannot upon his own grant reserve to himself a particular estate, for that would be to make himself both *lessor* and *lessee* ^c.

* Plowd. 155.
Perk. f. 704.

By the 29 Car. 2. c. 3. it is necessary that all creations and declarations of trusts should be in writing, except trusts resulting by operation of the law; of course, though the use is permitted to result, as it did before the statute, yet such resulting use could not be altered without a deed, or writing. After this statute it again became a doubt (notwithstanding Downman's case) whether resulting uses were not so executed as to exclude any subsequent deed: therefore, by the statute 4 Anne c. 16. f. 15. declarations of uses, or fines, or recoveries, manifested by any deed made by the party, who is by law enabled to declare such uses, after the levying, or suffering of such fines, or recoveries, shall be as effectual as if the act 29 Car. 2. cap. 3. for preventing of frauds and perjuries, had not been made.

Before the statute of frauds and perjuries, uses might have been raised by *parol* on such conveyances, as operate by transmutation of possession, as feoffments, fines, and recoveries; because the possession passed by a solemn act^a: but uses could not arise, even^a 2 Co. 76. before that act, by *parol* on a covenant to stand seised to uses, as was determined in the case of Callard v. Callard^o, before noticed; ^a 2 Roll. ab. 788. though uses might always have been raised on a bargain and sale, without writing^p. ^p Cro. Eliz. 345. But the statute of frauds has rendered these
distinct-

distinctions useless. I shall only here observe, that as the statute of frauds, by an express saving, does not extend to *resulting uses*, it has been held that *parol* proof may be admitted to rebut a resulting use since that statute ^a.

^a Dougl. 26.

Fifthly. What uses are not executed by the statute.

By virtue of the words of the statute, four necessary points are to be observed for the execution of an use ^q. 1st. There ought to be a person *seised*; for the words of the act are, where any person stand or be seised, &c. 2d. There ought to be a *cestuique use in esse*; the words of the act being, stand seised to the use of any person or persons, &c. 3d. There ought to be a use in *esse*, *scil.* in possession, remainder, or reversion. 4th. The estate out of which the uses are to arise, ought to be vested in *cestuique use*; for the words are, that the estate of such person, so seised to the use, shall be adjudged in *cestuique use*, &c. It follows from these maxims, that if there be not seisin in the feoffees, a *cestuique use in esse*, an use in esse, and if the estate of the feoffees cannot vest in *cestuique use*, there can be no execution of the use by this statute. Therefore contingent uses cannot be executed by the statute ^r. The doctrine of contingent uses is fully explained in the two cases of Dillon and Frene (or Chudleigh's case) and the case of Wegg v. Villers: the reasons whereof I shall endeavour briefly to explain.

^r Ba. uses, 45.

^q 1 Co. 120. a.

Chudleigh's case ^s was in effect thus: A. enfeoffed B. C. and D. and their heirs, to the use of himself, and his heirs, on the body of

of

of Mary (then wife of T. A.) lawfully begotten, and in default of such issue, and issue by another certain woman, lawfully begotten, to the use and performance of his last will for ten years, and after that term ended, to the use of J. S. his son for life, *remainder to the first issue male of J. S.* in tail, and so on to the tenth issue; then to the use of W. in tail, and then to the use of M. in tail, remainder to A. in fee. Afterwards A. died without issue by either of the women, and the feoffees before the birth of the first son of J. S. enfeoffed J. S. to the use of himself in fee, *without any consideration, and with notice* of the former uses; the first son of J. S. was afterwards born, and the question was, whether the feoffment by the feoffees to J. S. destroyed this contingent use to the first son of J. S.; which question depended upon another, viz. whether before the contingency happened, *i. e.* the birth of the son, the use vested, and was executed in the sons? and it was held by the majority of the judges that the use before the contingency was not executed in the sons; and that the feoffment entirely destroyed, and prevented the execution of the uses in contingency, although made without any consideration, and with notice.

By the argument of the judges in this case, it seems to be the better opinion, that upon the feoffment of A. all the uses *in esse* were immediately executed, and that there was no present actual seisin left in the feoffees, nor were the contingent uses executed. That though there was no *actual* seisin left in the feoffees

feoffees after the first feoffment, yet a *possibility* of seisin remained in them to serve the contingent uses, when they should arise, or come *in esse*. This possibility of seisin, when the uses came *in esse*, enabled them to be executed by the statute; and though before the vesting of the contingency, all the estates had been divested, yet when the estates had been reduced and revested, this possibility in the feoffees was still sufficient to serve the contingent uses. Therefore, if there be a feoffment to the use of A. for life, remainder to his first son, &c. remainder over; if A. before the birth of a son makes a feoffment, this shall divest all the estates, but still there is a right of entry in the feoffees to restore the former estate, and upon their entry they have a seisin sufficient to serve the use to such first son. But if a feoffment be made to the use of A. for life, remainder to B. for life, remainder to the first son of B. &c. remainder over: here if A. make a feoffment before the birth of B.'s son, this does not destroy the remainder to the first son of B.¹; for there is a right of entry in B. which is sufficient to support the contingent remainder to the first son; therefore if B. either during the life of A. or after his death, enters, this will revest the contingent use; so that if B. has a son born in his life-time, the use will be executed in him, without any previous entry by the feoffees. But if A. and B. had both died without entry made by B. and B. leaves a son born in his life-time, then there is an actual necessity for an entry by the feoffees,

in

¹ Roll. ab. 797.
pl. 12, 13, 14.

in order to restore, and re-vest the contingent use.

In all the above cases, it is very clear, that if before the arising or happening of the contingency (supposing the estate not to be divested) or if after the happening of the contingency (supposing the estates previous thereto to have been divested, as in the case last put) the feoffees had barred their own entry, then the contingent uses can never be executed, for want of a seisin in the feoffees to serve them when they come *in esse*^v. How can they then bar their right of entry? To this question it may be answered, that whenever the estate of the feoffees is transferred by them to any one, who does not come in *in privity* of estate, then is their entry completely barred. It is true that if before the statute, feoffees to uses had made a feoffment *with notice*, the second feoffee would have stood seised to the former uses, because he came in of the same estate, as the feoffees had; and in that case there was *privity* of estate in the second feoffee to all intents and purposes. But since the statute the feoffees have not an estate in *fee*; for all the uses in *esse* are immediately executed, and they have only a possibility of seisin, to serve those uses, which are not in *esse*. Therefore, when the feoffees, before the contingent uses come in *esse*, convey a *greater* estate than they lawfully possess, their grantee, though he *has notice* of the former uses, does not come in of the same estate, as they had; and of course the *privity* is totally destroyed. Upon these grounds it is, that the feoffment in Chudleigh's

^v 2 Roll. ab.
797. pl. 16.

leigh's case, (though with notice) destroyed the contingent uses; for J. S. came in of an estate, not in privity with that of the feoffees, but of a new estate acquired by disseisin.

2 Roll. ab.
296.

In the case of Wegg and Villers^w, A. seised in fee, covenanted to stand seised to the use of himself for life, remainder to his wife for life, remainder to his daughter B. for life, remainder to the first son of the body of B. remainder to the other sons, remainder to his right heirs. Afterwards A. granted the *reversion* in fee to J. S. but *without* any consideration, and *reciting* the former uses. A. *then* made a *feoffment* in fee of the same lands. B. married, and had issue a son, and A. died; after whose death his wife entered, B. died, as did the wife. The question was, whether the use to the first son of B. unborn was destroyed by this grant and feoffment? And it was held, that it was *not*; for when A. covenanted to stand seised to the uses above-mentioned, all the uses in *esse*, viz. to his wife and daughter, were immediately executed by the statute: that being the case, he actually and in fact stood seised only of the reversion, out of which seisin the contingent use to the first son of B. was to be served. Now, when A. granted the reversion, without any consideration, and with notice of the former uses, he granted no greater, or other estate, than what he was seised of; so that the grantee having notice of the former uses, and coming in as of the same estate that A. had, he had the proper requisite to stand seised to the former uses, viz. notice, and privity of estate. By this construction the
grantee

grantee was as fully seised to the uses, as A. himself was. The *grant* therefore of the *reversion* did not destroy the contingent use to the first son of B. But did the subsequent feoffment destroy those uses? No—for consider the state of the case *after* the *grant*. A. was then tenant for life, his wife tenant for life, B. tenant for life, and C. (the grantee) seised of the reversion, out of whose seisin the contingent use to the first son of B. was to arise. A. himself was not possessed of the seisin to serve the contingent uses. Therefore when A. made the feoffment, though he divested all the estates, and among the rest the estate of the *grantee*, yet he did not destroy the *seisin* of the grantee to serve the contingent uses, or in other words he did not bar the entry of the grantee to revest the seisin, or serve the uses when they came in *esse*. Then as the wife and B. were tenants for life, their entry (supposing they did enter) was sufficient to support and revest the estate of the grantee; and when the estate of the grantee was revested, the use to the first son of B. could well be served, when it came in *esse*, without any formal entry by the grantee. But supposing neither the wife nor B. to have entered, then there would have been a necessity for the grantee to enter, in order to revest the contingent use. It is scarcely necessary to observe, after what has been said, that if A. before he made the grant, had made a feoffment in fee, the use to the first son of B. would have been destroyed; for then A. would have granted a tortious fee, and his feoffee would not have had

had that *privy* of estate necessary to serve the contingent uses, when they came in *esse*.

As a contingent use is not executed by the statute, so neither is a use limited of *copyhold* lands^a: for if a use was permitted to be limited on conveyances of copyhold lands, then there would be a transmutation of possession by the sole operation of the law; which would be contrary to the nature of copyhold tenure. For it is a principle of that tenure, that the lands cannot be aliened with the consent of the lord.

As the statute 27 H. 8. c. 10. was made previous to the statutes of wills, 32 and 34 Hen. 8. it necessarily follows, that the former does not extend to *devises* to uses; for a statute cannot be considered to extend to any thing, which at the time of the making of it, did not exist⁷. But as the testator's intention is generally the guide in cases of devises, it has been repeatedly held², that if A. devise to B. and his heirs, to the *use* of, or in trust for C. and his heirs, or in trust to permit C. and his heirs to take the profits, it shews the testator's intent, that C. should have the *legal* estate in fee, and the law upon such an interpretation of the testator's intent, will give it such an operation. But if there be a devise to the *use* of A. for *life*, remainder over, this cannot take effect by way of *use*, because as there was no *seisin* to serve the use, in that case there can be no use^a.

We have seen, that a *conveyance*, or *devise* to trustees, in trust to permit A. to receive the profits, this trust is a use executed by the

⁷ Butl. note 1.
Co. Litt. 271. b.
under fol. 277.

^a.
¹ 1 Vern. 79.
415.
² Salk. 679.
^a Atk. 573.

^a Butl. note 1.
Co. Litt. 271.
b.
under fol. 277.
^a.

the statute^b. But here the courts have taken^b *Supra*, 154. a distinction; for they hold, that if lands are limited, or devised to trustees, in *trust* to *pay over* the profits, in this case there is no such use, as can be executed by the statute; for the lands must remain in the hands of the trustees in order to perform the trust.

As the statute says, that when any person or persons stand *seised* to the use of another, &c. it has been resolved, that a term of years cannot be limited to a use; but we have already had a full discussion of the doctrine relating to terms^d.

Finally, when the courts of law, after the passing of the statute of uses, took the cognizance of uses, they held that no use limited on a use could be executed by the statute; therefore they held, that if there had been a conveyance to the use of A. and his heirs, to the use of B. and his heirs, this use could not be executed in B. by the statute^c.

When, therefore, a man limited a use upon a term of *years*, when he limited an estate to trustees in trust to *pay over* the rents and profits, or when he limited a use upon a use, all these were such uses or trusts, for which he had no remedy in the courts of common law. Denied relief, then, by the strictness and technical scruples of the common law, *cestuique trust* was obliged to seek redress in the courts of equity, which redress indeed was readily granted him; for surely the trust, in either of those cases just mentioned, ought as strictly to be performed in conscience, as any other *use*. The legal nicety of the common law introduced the notion of trusts; for
though

^a 1 Eq. ab. 383.

vide also.

³ Mod. 146.

147.

vide on devise

of this kind,

¹ Brow. Cha.

Rep. 75.

² Term. Rep.

444.

⁴ *Supra*, page

42 to 71.

also 149.

^c 1 Atk. 591;

² P. W. 146.

147.

Dyer, 155. a.

B. N. C. 284.

¹ Co. 136. b.

137. a.

though they agreed, that they were not such *uses*, as could be executed by the statute, yet they were *trusts*, to the performance of which equity ought to lend its assistance. The statute then, 27 Hen. 8. has had no other effect than to abolish all the inconveniences attendant upon *uses* at the common law; and to introduce a new kind of *use*, by the name of *trust*, modelled and shaped after its own fashion: being, as it is properly called, a creature of equity. The chancery was well aware of the many inconveniences which attended *uses*, as they stood *before* the statute; and therefore in exercising an exclusive power over these trusts, it has formed them, so as not to be subject to any of the mischiefs, which followed *uses*. At the same time they have rendered them so as to answer all the necessities, and contingencies of family settlements, and domestic provisions. The general voice and reason of mankind has assented to this new species of *uses*: and indeed, as most of the property in the kingdom is now conveyed in trust, and as the laws and decisions relating to trusts are so well understood, and the convenience of them so universally experienced, any alteration or abolition of them by the legislature is a thing not to be *expected*, and far less to be *wished for*. We frequently find it said in the books, that *trusts* are the same as *uses* formerly were. But however true it is, that we have borrowed the *notion* of *trusts* from the doctrine of *uses*, yet certainly, in their construction, *trusts* differ very widely indeed from *uses*; and unless this total difference of construction had taken place,

place, (to use the expression of Lord Hardwick ^b) "Trusts would not have been introduced."

1 Atk. 592.

The trusts created by the statute of uses are of a *permanent* and *general* nature; and indeed are nothing more than a *species* of *secondary* uses. They therefore differ from those *special* trusts, which we have had occasion to notice in a former part of this work ^c.

^c Supra, 15 20 18.

We will briefly consider,——

First. *The nature of trusts in general.*

Secondly, *The nature of the estate of the trustee.*

Thirdly, *The nature of the estate of cestuique trust.*

A trust is said to be a *right* to receive the profits, and to dispose of the land *in equity* ^a. By this definition then, a trust is, properly speaking, an *equitable title* to lands; and of course all such *legal* titles, as are recognised as such by the courts of *law*, (however similar they may be in their nature) cannot, *prima facie*, in their strict sense be *trusts*: but this observation must not lead us to imagine, that all *equitable* titles are *trusts*; and *e converso*, that all *equitable* titles, which are *not trusts*, are *legal* titles. This is exemplified in the case of a mortgage. Thus before the expiration of the time for payment of the mortgage money, the mortgagor has a right *at law* to perform his condition; but after that time, and upon non-performance of the condition, the estate becomes absolute *at law*, and there is only left to the mortgagor the *equity* of redemption, which equity of redemption

^a 1 Mod. 171

tion is not merely a *trust*, but a *title* in equity ^b. However, in the case of an advowson, the mortgagee until foreclosure has been said to be in the *nature* of a *trustee* for the mort-
gagor ^c.

^e 2 Vern. 401.
Wide note A. to
3 P. W. 251.

^d Finch, Rep.
159.

^e 2 Vern. 106.
2 Bro. P. C.
39.

^f Finch, Rep.
356, 357.

^g 2 P. W. 314.
^h Ca temp.
Talbot. 97.

ⁱ 2 Vern. 288.
294.
^k 2 Bro. P. C.
350.

^l 2 Vern. 167.
2 P. W. 415.

To prevent the same inconveniences which arose from secret and parol transfers, and declarations of uses at the common law, the statute 29 Car. 2. c. 3. s. 7. requires all declarations or creations of *trusts* to be manifested by some writing, signed by the party, or by last will in writing; and also that *assignments* of *trusts* should be in writing, signed by the party assigning the same, or by last will. As the disposition of trusts is guided by the courts of equity, and as they always dispose of them, according to the presumptive intention of the parties, there is no set form of words adapted to declare these trusts, as there is in limiting estates ^d: nor is there any regular mode or form particularly settled with respect to the *declaration* of trusts, provided it be in writing, according to the above statute. Therefore a letter ^e, or a bond, to perform the particular trusts of a certain conveyance, in which no trusts are mentioned ^f, or a bond to assign to cestuique trust, as he shall direct ^g, or a note ^h, or an answer in chancery ⁱ, or a *covenant* to make conveyances, or to purchase lands to certain uses ^k, these are all good declaration of trusts, if they sufficiently notify, or discover the *intention* of the parties, that there should be trusts. But the declaration must prove an *absolute* intention, that there should be a trust, and not such an intention, as leaves it *optional* in the grantee

grantee or devisee to execute it, or not. Thus if there is an *absolute devise*, and then the testator *recommends* the devisee to give, or to do such a thing to or for such a person, this is no *trust*, which the devisee is bound to perform, but only a recommendation¹. But in this case if the testator had *directed* him, instead of recommending him, it certainly would have created a trust^m.

¹ Amb. Rep.

^{686.}

Vide 1 Cha. ca.

^{310.}

^m 3. Cha. Rep.

^{38.}

The statute 29 Car. 2. has at the first view annulled all parol declaration of trusts, and excluded all parol evidence to prove the intention of the parties to create a trust. Therefore the courts in numberless instances have refused to listen to any kind of parol proof to establish a trust. In some instances, however (especially between grantor and grantee, or deviser and devisee) they seem to have admitted exceptions to this general rule. Thus parol proof has been admitted to shew a trust, when from the mean circumstances of the pretended owner of the estate it makes it impossible for him to be the real purchaserⁿ. So the courts have admitted this kind of evidence in case of manifest fraud: as where a man made his wife *executrix*, and the son afterwards prevailed upon his mother to procure his father to make a new will, and appoint him executor: he at the same time verbally promised to be a trustee for her. The father did alter his will accordingly; and though there appeared no declaration of trusts in writing, yet it was held to be a good trust, notwithstanding the statute of frauds and perjuries^o.

ⁿ 2 Atk. 71. ca.

^{70.}

^o 1 Vern. 296.

So upon an assignment, though there were no express trusts declared, yet as it might be collected from circumstances, arising out of the assignment itself, that it was inconsistent with an *absolute* assignment, parol proof was admitted to prove the intention of a trust⁹. The statute of frauds relates only to declarations of trusts of *real estates*; for a declaration of trusts in the *personalty* need not be in writing¹.

⁹ 1 Atk. 447,
448.

¹ 10 Mod. 405.

In the statute 29 Car. 2. there is a saving, which relates to trusts resulting by implication of law, and leaves them as they were before the statute. As resulting *uses* are immediately executed by the statute of uses, and thereby form a legal estate, this saving, in the statute of frauds and perjuries, is said only to relate to such implied and beneficiary interests, or modern trusts, as result from the legal estate, when made such by the operation of the statute 27 Hen. 8¹. These resulting trusts are allowed to arise both on conveyances, and on devises. We will therefore consider them first on *conveyances*.

¹ 1 P. W. 112,
113.

The courts have allowed of resulting trusts in these two particular instances, viz. where the conveyance has been taken in the name of one, and the purchase money paid by another; and secondly, where the owner of an estate has made a *voluntary* conveyance thereof, and a declaration of the trusts as to one part, and has been silent as to the other². But it seems that the consideration money in the first instance ought to be *expressly* mentioned to be paid by the real owner; for if

² 2 Atk. 150,
151.

¹ Vern. 366,
367, 109.

A. pur-

A. purchases in the name of B. and the consideration is expressed to be paid by B. and there is no declaration of the trusts, there can be no resulting trust to A. though there be positive proof that A. paid the money, But a declaration by B. after the *death* of A. will take it out of the statute of frauds ^{v. 1 P. W. 321,}
 According to this principle of the necessity ^{322. Vide Cha. Prec.}
 of an express mention of the person by whom ^{103. 168. Vide 2 Vern.}
 the consideration was paid, it was held in the ^{167, which seems rather contra.}
 case of Kirk and Webb ^{w.}, that if a trustee ^{contra. vide Cha. Prec. 84.}
 purchased lands with the trust money, and ^{pl. 77.}
 takes the conveyance in his own name,
 without declaring the trust, yet *reciting that the purchase is made with the profits of the trust estate*, there will be a resulting trust : but if there be no *recital*, or mention of that kind made, then it will not be a resulting trust.

With respect to the second instance of a resulting trust, there must be a declaration of some part of the trust of the land, although the conveyance be merely voluntary ; for in the case of Lloyd v. Spillet ^x, where there ^{2 Ba. n. Cha. Rep. 384.}
 was a voluntary conveyance in consideration ^{2 Atk. 148.}
 of ten shillings (which consideration was sufficient to pass the *legal* estate ;) and the question being whether there was a beneficiary interest, or resulting trust to the heir at law ; Lord Hardwicke said, he was bound down by the statute of frauds and perjuries, to construe nothing a resulting trust, but such as come under the above-mentioned two descriptions. However, there certainly have been other cases, where these kind of constructive trusts have been allowed of. Thus
 where

where there were three lessees of a church, and one of them surrendered the old lease, and took a new one in his own name, it was held notwithstanding to be a resulting trust for them all ^y. So it is a rule, that if a guardian, or trustee for an infant, renews a lease, the renewed lease will be to the use of the infant ^a. But if a guardian, or a trustee for an infant, to whom lands are devised, or descended, but the title to the lands is really in a third person; here if the guardian or trustee buys in the title, there can be no trust for the infant; for he is as much at liberty to buy as any other person ^b. As a further proof, that the two cases, put above as instances of resulting trusts, are not the only cases, as asserted by Lord Hardwicke, it has been held, that if a mortgagee, whose mortgage was taken in the name of a trustee, with a proper declaration of the trusts, buys in the equity of redemption, in the name of the same trustee, without any declaration of the trust, yet there is a good resulting trust to the mortgagee ^c. So if a term is created to pay debts; after debts paid there is a trust for the heir ^d. It is said that there can be no implied trust between a lessor and lessee ^e; but between an assignor and assignee ^f, there may be such implied trust, as we have before seen.

^y 1 Vern. 276.
ca. 277.

^a 7 Bro. P. C.
128.
¹ Vera. 484.

^y 2 Freem. 52.
pl. 59.

^y 4 Bro. P. C.
67.

^d 2 Vern. 646.
Vide 2 Cha. Ca.
140.

^e 7 Bro. P. C.
532.
¹ Atk. 447
448.

⁸ Cha. Prec. 80.

It has been held, that on a grant of the next avoidance of a church to a person, without his privity, there was a resulting trust to the grantor ⁸. So where a daughter released her portion without consideration, in order that her father might make a clear settlement upon

upon his son, it was held that there was a resulting trust in the father^h.

^h 1 Freem. 305.

It is a pretty general rule, that if a father buys lands in the name of his son, which son is unprovided for at the time of the purchase, the purchase shall be accounted as an advancement for the son, and not as a trust for the father, though the father has been in possession, and received the rents and profits^k. The same rule holds when the grandfather takes lands or bonds in the name of a grand-child, provided the father is dead^l: for then the grandfather is in *loco parentis*.

^k 1 Cha. Ca. 296.

^l 1 Eq. ab. 381. pl. 6.

² Vern. 19.

² 1 Freem. 252.

¹ 2 Cha. Ca. 26.

In these cases, no parol proof can be admitted to prove a trust was intended^m; nor

^m 1 Eq. ab. 382. pl. 9.

can the father by a subsequent deed declare his son to be a trusteeⁿ; nor can the son him-

ⁿ 2 Cha. Ca. 231.

self on his sick bed make such a declaration of trust in favour of his father, so as to prevent his own wife from dower; such declaration of trusts being deemed fraudulent, and made to deceive purchasers^o. So if a father buys in the name of a younger son, and a trustee, this is also an advancement, although a reversion was previously settled on the younger son^p. But if the younger son dies before the father, the trustee in equity is bound to convey it back to the father.

^o 2 Vern. 436.

^p 1 P. W. 111.

Ibid.

It seems, however, that where the son is provided for at the time of the purchase, he stands then merely in the situation of a *stranger*^q. So where a grandmother, during the life of the father, bought an annuity in the name of a grandchild; the child's father gave a bond

^q 2 Cha. Ca. 231, 232.

a bond to the grandmother for re-payment of the annuity, if the child died before the grandmother. The grandmother received the income, and kept the tallies, the grandchild making no claim; and it was held to be a *trust* for the grandmother^r. So though a purchase in the joint names of a father and son, shall *prima facie* be deemed an advancement for the son^s, yet the son shall not have his father's moiety by survivorship, against a judgment creditor of the father^t.

^r 1 P. W. 608.

^s 1 Chs. Ca. 27, 28.

^t 2 Atk. 477.

As parol declaration before the statute of frauds and perjuries might have rebutted a resulting trust to the grantor, and as resulting trusts are saved by that statute, it seems that even now parol proof may be admitted to prevent any resulting trust^v.

^v Vern. 294.
¹ P. W. 113.

With respect to resulting trusts on devises, it is a general maxim, that where lands are devised for a particular purpose, what remains, after the particular purpose is satisfied, results to the heir at law of the testator. Thus, if lands are devised to executors for payment of debts and legacies; after the payment of debts and legacies, the executors will be trustees, as to the surplus, for the heir at law^w; though the executors have no legacy, and the heir at law has an express one^x. So where A. devised lands to trustees to sell, and to dispose of the money as he should appoint, and for want of appointment to his four nephews; A. appointed several sums to be paid to several persons, which sums did not amount to the value of the lands;

^w 2 Vern. 645.

^x 1 P. W. 390.

lands; and it was held, that the surplus resulted to the heir^a. In another case, A. devised to his wife a rent charge for thirteen years, for payment of debts; and devised lands to his wife in augmentation of her jointure. It was held, that the surplus of the rent charge, after the debts were paid, resulted to the heir^a.

^a 1 Bro. P. C.

So where a rent charge was devised to be sold to pay legacies to the amount of £.800; but if the rent charge sold for £.1000, then an additional legacy of £.100 was given to B. and another of £.100 was given to C.: it was held, in this case, that if the rent charge sold for above £.800, and less than £.1000, the residue, above £.800, would result to the heir at law, and not be divided between B. and C.^a. Upon the same principle was the case of *Digby v. Legard*^b determined, where in E. B. devised her real and personal estates to trustees, in trust to sell and pay debts, and to pay the residue to five persons, to be equally divided between them, share and share alike (which words in a will create a tenancy in common^c); one of the residuary legatees died in the life-time of the testatrix; and the court held, that this was a resulting trust (as to the share in the real estate of the residuary legatee, who died in the testatrix's life-time) for the benefit of the heir at law. Upon a similar bequest of a personal estate, it seems the share of the legatee so dying would go according to the statute of distributions^d. And it may be observed, that a devise of the *residuum* of a personal estate, to two or more (without adding any other words)

^a 2 Vern. 571.

³⁷².

^a 3 P. W. 253.

^b Note 1. 3 P. W. 22. ed. 1787. Vide also the case of *Akeroid v. Smithson*, in the same note; and the case to which the note is annexed.

^c 1 P. W. 700. ² P. W. 282.

^d 1 P. W. 700.

² P. W. 531.

1 Vern. 482.

2 P. W. 347,

348.

3 P. W. 115.

4 P. W. 347.

words) creates a joint tenancy, and upon the death of one of the devisees, his share will survive^c. However, in the civil law, such a bequest would have been a tenancy in common^f.

5 1 Atk. 619.

The general rule, we have just been treating of, that where lands are devised for a particular purpose, viz. to be sold for payment of debts, &c. after the purpose is satisfied, there is a resulting trust to the heir at law, admits however of several exceptions: for if a particular reason occurs, why the testator should intend a *beneficial* interest to the *devisee*, there are no precedents to warrant the court to say, it shall not be a beneficial interest. This is explained by Lord Hardwicke^g, who said, if J. S. devised lands to A. to sell them to B. for the particular advantage of B. that advantage is the only purpose to be served according to the intent of the testator, and to be satisfied by the mere act of selling, let the money go where it would; and that there was no precedent of a resulting trust in such a case. So if A. devised lands to J. S. to sell to the best price to B. or to lease for three years at such a fine, there could be no resulting trusts to the heir of the testator. It may happen too that both the devisee and the heir at law may be completely shut out of any part of the *beneficial interest*; as suppose a devise to trustees to sell, and to dispose of the money arising by the sale to such uses and for such purposes as they, or the major part of them, shall think proper; the testator having previously intimated an intention of giving the money to
chari-

charitable purposes. Here the heir at law can have no resulting trust, for a man empowering others to sell, may disinherit his heir, as well as by his own actual disposition; nor can the trustees have any beneficial interest, for his giving his estates to persons, whom he *names trustees* to such purposes as they, or the *major part* of them, shall judge fit, plainly shews he intended them no benefit, but only an authority ^b.

^b 2 Atk. 568
to 569.

We frequently find it laid down as a rule, that the limitation of *trusts* and *legal* estates must have the same constructionⁱ. This position deserves some notice. 'Tis true the same construction must hold between them both, with respect to the *measure* of the limitation. Thus both of them are subject to the same laws for the prevention of perpetuities¹. But with respect to the construction of *words*, the same rule perhaps does not always hold; for though the same words, which would at law create an estate tail with regard to a *legal* estate, will, when applied to trusts, have the same operation, provided the author of the trust does not *plainly* express his intent to the contrary^m; yet it is very certain, that when there is a *plain* expression, or *necessary* implication, to rebut the *legal* construction of the words of limitation, the *intent* shall explain and qualify such limitation; for if there be a devise of an estate in *trust*, the words of which devise, if applied to a *legal* estate, would have created an *estate tail*, and if there are any expressions, or necessary implications, in the devise, that the testator only intended

ⁱ 1 P. W. 23.
109.
³ P. W. 259.
² P. W. 713.

¹ 3 Ch. Ca. 48.

^m 2 Vezey, 646.
¹ P. W. 142.

the

the first devisee in *trust* to have an estate *for life*, the courts of equity will, in performance of the intent of the testator (upon an application from the devisee to have a conveyance from the trustees) decree an estate to be conveyed, whereby the heirs of the body of the devisee may take an estate by *purchase*, and not by *limitation*ⁿ. However, it has been lately said, that in both *legal* and *trust* estates, the *intention* of the testator is equally to be attended to, and it shall prevail against the technical import of words of limitation^o.— But this subject has already employed the pen of a very able writer. I need not add, that I allude to Mr. Fearn, in his *Treatise on Contingent Remainders*.

Though in general it is true, that the same construction holds in limiting *trusts* as *legal* estates, yet it has been said, that if lands be given to a man without adding the word *heirs* (which at common law would have given an estate for life) yet if a *trust* be declared of that estate, which trust cannot be satisfied, but by cestuique trust taking an *inheritance*, the fee passes without the word *heirs*^a.

It is regularly a maxim, that *aequitas sequitur legem*. Therefore the statute of frauds, which requires all devises of lands devisable to be attested by three witnesses, extends also to devises of trusts of lands; so that a devise of a trust of lands must be attested by three witnesses, in the same manner as the lands themselves^p. As a man, seised of copyhold lands surrendered to the use of his will, may direct the uses of the surrender by a will, *not* attested

ⁿ 2 Atk. 570 to 584.
^a P. W. 474.
^o Eq. ab. 185. pl. 30.

^o Vide Doug. Rep. 327; also the cases referred to in note 1. 2 P. W. 478. ed. 1787.

^a 2 Atk. 72.

^p 2 P. W. 461.

attested by three witnesses; so if the legal estate of the copyhold is in trustees (by which means *cessuque trust* cannot surrender) still he may devise the trust by a will, not attested by witnesses ⁹.

⁹ 2 Atk. 37, 38.

In imitation of the rules relating to legal estates, it is now fully settled, that there may be a tenancy by the curtesy of a trust of inheritance¹. But in a very particular case², where a father devised lands to trustees, in trust to apply the rents and profits to the sole and separate use of his daughter *during her life*, not subject to the debts and controul of her husband; and also to permit his daughter by deed or writing to devise the lands to such persons as she should think proper; now here the daughter had the benefit of a trust of *inheritance*, and yet Lord Hardwicke held, that the husband should not be tenant of the curtesy of the trust. We find it established, that there shall not be tenant in *dower* of a trust³. This doctrine seems rather irreconcilable with the one just mentioned. Indeed, Sir Joseph Jekyll, in his argument in the case of Banks and Sutton⁴, made a distinction between a trust of inheritance by the husband himself, and a trust created by another person; in the former case he held, that the wife should not have dower; but in the latter, that she was entitled to it. But this distinction is denied in the case of the Attorney General v. Scott⁵. So that now dower is excluded from all *trust* estates.

¹ 1 P. W. 109.

² 3 P. W. 234.

³ 1 Atk. 603.

⁴ 607.

⁵ 3 Atk. 699.

⁶ 7:5, 7:6.

⁷ Ca. 267.

⁸ 3 P. W. 234.

⁹ 1 Atk. 525.

¹⁰ 2 P. W. 708.

¹¹ 709.

¹² Ca. Temp.

¹³ Talb. 138.

Trust estates in general are not affected by the statute of limitations. Thus, a trustee has

* Pinch
Rep. 262.

* 2 P. W. 144.

* 2 P. W. 323.

3 P. W. 89.

1 Sal7. 154.

2 Vern. 141.

Pre. Cha. 385.

* Note G.

3 P. W. 310.

2 Cha. Ca. 247.

1 Cha. Ca. 268.

* 3 P. W. 310.

* 2 Vern. 248.

ca. 232.

* S. 10.

* 2 P. W. 736.

* 1 Cha. Rep. 30.

1 Cha. Ca. 8.

* Hard. 495.

3 Cha. Rep. 34.

has been decreed to re-convey after twenty years possession ^x. So where a trust is created for payment of debts, it will not only *take* a debt out of the statute of limitations, incurred *since* its creation ^y, but will also *revive* a debt barred by the statute before its being raised ^z. But it is said, that a fine, and five years non-claim, will, in favour of a purchaser, bar a trust term, though cestuique trust be an infant ^a. So if a trustee neglects to sue within the time prescribed by the statute of limitations, cestuique trust (though an infant) is bound by it ^b. By the statute of frauds and perjuries a trust of inheritance is made *assets* at law ^c; and by the express provision of that statute ^d, *trusts* are made liable to debts, and to execution upon any judgment, statute, or recognizance. Trust estates *descend* according to the rules of descent ^e; and not only a trust in *esse* may be aliened, but even the *possibility* of a trust may be assigned in equity ^f. A trust of *inheritance* may be forfeited for the *treason*, though not for the *felony* of cestuique trust ^g.

Secondly, *The nature of the estate of the trustee.*

As the legal estate is vested in the trustee, it follows, that it cannot be divested out of him, unless it is with his concurrence, and his joining in a proper conveyance for that purpose. He is, therefore, in general considered as a mere instrument of conveyance. But his having the *legal* estate in him renders him in some cases of rather more consequence, than a mere instrument of conveyance, solely adapted for the benefit of cestuique

tuique trust. For if he conveys the trust
 lands to one for a valuable consideration, and
 without notice of the trust, the purchaser will
 not be a trustee in his stead^p. So, like ^{1 2 Freem. 43.}
 the real owner, a trustee may in some cases ^{pl. 47.}
sue in his own name^q. But generally indeed ^{Hard. 469.}
 cestuique trust should be made a party^r; ^{1 Cha. Rep.}
 though on the other hand, in some instances, ^{245, 246.}
 he should not bring cestuique trust before ^{1 Toth. Rep.}
 the court, on pain of incurring costs^s. So a ^{285.}
 trustee of his own accord may release or ^{1 H. & C.}
 compound a debt, if it be for the *advantage* ^{Prac. 247.}
 of the trust estate^t. ^{2 Atk. 48.}

Before the statute of uses, we have seen
 that the estate of the feoffees was subject to
 all the incidents to which a real ownership
 was liable; whilst the estate of *cestuique use*
 was considered in a mere secondary light.
 Hence sprang all the just complaints against
 uses, and their inconveniences. After the
 introduction of *trusts*, the courts of chan-
 cery knew, that if the same mischiefs at-
 tended the estate of the trustee as that of
 the feoffees before the statute, trusts would
 not have been tolerated. They have, there-
 fore, very wisely considered the trustee as
 having the legal ownership, so far only as
 to be *beneficial* to cestuique trust, and not
 subject to any advantage or disadvantage,
 which may arise from the trustee personally,
 as having the legal estate. On account of
 the legal seisin in the trustee, he would at
law stand in the same situation as the feoffee
 stood before the statute of uses. But as
 trusts were creatures of equity, those courts
 have properly interfered in that respect.

There-

Therefore, if a trustee commits felony, though the lands are forfeited at *law*, yet cestuique trust may have relief in equity^v; and the same rule, I take it, holds, if the trustee commits *treason*^w; for as the *cestuique trust* forfeits his trust for *treason*, there is neither equity nor reason, that the *trustee* should forfeit it for the same offence. So if a trustee dies without an heir, though the lord by escheat is entitled to the lands at *law*, yet are they subject to the trust in equity^z. Likewise, if a trustee devises all his *estate*, this at *law* passes an estate, of which he was but trustee; but in *equity* the devisee holds it, subject to the same trusts^y. The estate of the trustee is not subject to dower^z; nor for the same reasons is it, I apprehend, subject to curtesy, according to the opinion of Lord Hardwicke, in *Caseborne v. Inglis*^a, who declared the estate of a *mortgagee* in fee not to be subject to curtesy, and that with respect to the *inheritance*, the *mortgagee* was certainly a *trustee* for the mortgagor^b. I am not aware, however, of any case, wherein this point is expressly determined. So the estate of the trustee is not subject in *equity* to any of his debts, judgments, or incumbrances; however, it may be so at *law*^c. Nor is it subject to his bankruptcies^d. These constructions arise from a well known principle of equity, that no act of the trustee shall prejudice cestuique trust^e. And, indeed, I do not recollect any case, where the trustee alone can affect the trust estate by *forfeiture*, or by *incumbrances*. With respect to *alienation*, he can only injure cestuique trust

* Cart. 67.

Hard. 167.

1 Sid. 403.

* Vide 3 Com.

Dig. 386.

* 1 Eq. ab. 384.
in notis.

* 2 P. W. 200,
201.

* 2 Freem. 43;
pl. 48.

* 7 Vin. ab. 157.

* 1 Atk. 606.

* 1 P. W. 278.

* Note A. to

3 P. W. 187.

* 1 Eq. ab.
384, in notis.

trust in the above instance, viz. by conveying, when in possession, for a valuable consideration, and without notice; and even then cestuique trust may compel him to make satisfaction^f, though such satisfaction, it is said, can only be taken out of his *personal* estate^g. So if a trustee conveys to one, who has no notice of the trust, and the grantee levies a fine, and five years pass, and afterwards the trustee purchases the same lands again for a bona fide consideration: still he shall be a trustee, as he was before, though his grantee was not^h. Or if a trustee conveys to one for a valuable consideration, who has notice, and the grantee levies a fine, yet cestuique trust is not bound to enter within the five years^h.

^f Barn. Chag
Rep. 303.
^g 2 Atk. 119.

^e 1 Vern. 60.
^{ca.} 58.
² Cha. Ca. 124.
⁹ C.

^h 1 Vern. 149.

As the trustee cannot but in one instance injure the estate of cestuique trust by alienation, so neither can he change the nature of the trust estate by turning money into land, or land into money, or a lease for years into a freeholdⁱ. But if a guardian for an infant renews a lease for three lives, this renewed lease is a new acquisition, and shall go to the heirs of the father, though previous to the renewal it went to the heirs *ex parte materna*^k. So too as the trustee cannot prejudice cestuique trust, by *doing* what he might not lawfully do, so he cannot hurt him by *omitting* to do what it was his office to perform^l. And it is generally true, that trustees, in the composition of debts, and buying in of incumbrances, for less money than is due, shall not benefit themselves, but the trust estate^m. But, on the contrary, if they compound, or release

³ P. W. 100.
^{101.}
¹ Vesey, 461.

² Prec. Cha.
³ 9.
¹ Atk. 480.

¹ 3 P. W. 213.

^m = 1 Salk. 156.
Note A. 3 P.
W. 251.
¹ Vern. 49.

release a debt or incumbrance, which does not benefit the trust estate, they must answer for itⁿ. However, it is said, that if a trustee for money places it out in the funds, or other security, whereby he gains considerably, he shall have the *whole* benefit thereof to himself; because if he had lost, he would have borne the whole loss^o. But if the trustee had been insolvent at the time of placing out the money, then cestuique trust would have had the whole benefit; because he must have sustained the whole loss.

* 1 Eq. ab. 398.
Vide
1 P. W. 648.
where the
money was laid
out by consent
of all the
parties.

* 1 Atk. 59, 60.
Note a. to
3 P. W. 251.

* 2 Atk. 60.

* 3 P. W. 251.

The courts of equity look upon trusts as *honorary*, and as a *burden* upon the *honor* and *conscience* of the person intrusted, and not undertaken upon mercenary motives: therefore they have always held a strict hand upon trustees, when they have made any extraordinary agreement with cestuique trust for an extra allowance beyond the terms of the trust^p. But if a trustee comes in a fair and open manner, and tells cestuique trust, that he will not act in such a troublesome and burthenome office without farther compensation given by cestuique trust, over and above the terms of the trust, and such farther compensation is contracted for between them, this contract perhaps would not be set aside, though there is no precedent, wherein such a bargain has been confirmed^q. Upon this principle Lord Chancellor Talbot said^r, it was an established rule, that a trustee should have no allowance for his care and trouble in the management of the trust; for if on those pretences allowances were to be made, the trust estate might be loaded, and rendered

dered of little use. Besides great difficulty might attend in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another: and in this respect it can be no hardship upon any trustee; for it is at his option either to accept or refuse of the trust. But though a trustee is not himself allowed for his trouble, yet it seems, that if he employs a bailiff to manage the trust estate, he must be allowed for the employment of, and payment to the bailiff¹. So a trustee is generally allowed his necessary charges and expences laid out in the management of the trust estate².

In *Palmer v. Jones*³, it is said, that a trustee should not be charged for *imaginary* value, or more than he had actually received; that very supine negligence might indeed in some cases charge a trustee with more than he had received. So if a trustee receives money on account of cestuique trust, an infant, and the trustee is robbed of this money, together with some of his own, he shall not be charged for the stolen money⁴. It has also been held, that where there are two or more trustees, each of them shall be charged with no more than what each actually received, though all of them joined in a receipt for the whole⁵. But if there is fraud proved in the trustee, who permitted his companion to receive the whole, then the former may be charged, though he received nothing⁶.

Though trustees are not allowed any thing for their trouble and care in the management of the trust estate, yet it is but reason-

¹ 1 Vern. 316.

² 2 Cha.

Rep. 158.

³ 1 Vern. 144.

⁴ 2 Cha. Ca. 2.

⁵ 1 P. W. 81.

⁶ 2 Atk. 318.

⁷ 2 Vern. 516.

⁸ 3 Atk. 584.

⁹ Bridgm. 38.

able and just, that they should be allowed all such *costs, damages, and expences*, as may be incurred in the execution of the trust, and discharge of their office; provided there be no mismanagement, or breach of trust^a. Therefore Lord King said^a, it was a rule, that a trustee ought to be saved harmless by cestuique trust, as to all damages, relating to the trust. Thus, where a trustee has honestly and fairly, without any possibility of being a gainer, laid down money, by which the cestuique trust was discharged from being liable to pay a greater sum, the trustee ought to be repaid: even if the trustee errs in the management of the trust, and is guilty of a breach of trust, yet if he goes out of the trust with the approbation of cestuique trust, the breach of trust ought rather to fall upon the estate of cestuique trust^b; for the courts are ever anxious to deliver the trustee from any misapplication of the trust money. If a trustee is sued on account of the trust estate, his costs shall be allowed him^c. So in the application of the trust money, the trustee is generally only answerable for *fraud*, or gross neglect, which indeed is reckoned equal to fraud. Therefore if a trustee, with the consent of all the parties interested, lets the trust money remain in the hands of A. who becomes insolvent, the trustee is not answerable^d. If a trustee pays money into a banker's hands, who, at the time of paying it, is in credit, but afterwards fails, the trustee is not accountable^e. So if a trustee is empowered to raise, and pay portions at 21 or marriage, with maintenance in the mean time,

^a Vide Finch.

Rep. 361.

12 Mod. 560.

^a 2 P. W. 455.

^b 3 Atk. 444.

^c Cha. Ca. 138.

^d 7 Brown. P. C.
293. 301 to 303.

^e Amb. Rep.

219

Toth Rep. 233.

vide Cont. 5-

Ba. ab. pl. 12.

time, not exceeding the interest of the portions, he may pay part of the portion in placing out one of the children, as apprentice; and though the child dies before 21 or marriage, and on that event the portion is limited over, yet he shall be allowed it^f. ^{f 2 Vern. 137.}

But if the trustee is negligent, or imprudent, in the application of the trust money, then he must answer for it; therefore if there be a trustee to pay a portion at a certain time, and until that time to pay maintenance money, and he pays maintenance money *exceeding* the interest of the portion, he will not be allowed what he so paid above the interest^g. Upon the same reason, if a trustee^{g 2 Freem. 78.} for payment of children's portions pays one of them his full share, and then the trust estate decays, he will not be allowed such payment^h. ^{h 2 Cha. Ca. 131.} Trustees are not only answerable for what they themselves do, but for the acts of their agentsⁱ. But if there be a devise to trustees with a power given them to appoint agents to manage the lands, and they appoint one, who is then solvent, they shall not answer for him, though he afterwards proves insolvent; but it is otherwise, if he were insolvent at the time of nomination^k. ^{k 12 Mod. 560.}

When trustees are appointed to preserve contingent remainders, if they join in any conveyance in order to destroy the remainders, this shall in general be deemed a breach of trust^l, whether the settlement be voluntary, or not^m. In some cases, however, the courts have decreed them to make conveyances in order to defeat the contingent estatesⁿ; but then these have been very particular^{o 1 P. W. 536.} ^{o 2 Vern. 303.}

particular cases: it would therefore be always prudent in trustees to receive the directions of the court, before they agree to destroy those estates, which they were intended to preserve.

Whenever cestuique trust is entitled to an estate *tail*, then upon the request of cestuique trust, the trustee ought to join in barring the tail; and it will be no breach of trust in him to join in barring the entail. For his joining in barring the entail is nothing more than what he was compellable to do; though indeed cestuique trust alone might have barred it in equity^o.

^o 1 Eq. ab. 384.

^p 1 Eq. ab. 395.

¹ P. W. 485.

⁹⁰, 91.

³ Atk. 447.

It is now said to be a constant rule^p in chancery, that if lands are vested in trustees to the use of one, and the heirs of *his body*, with *remainder* over, that the trustees are not to convey a *fee* but an estate tail; though the tenant in tail will have it in his power to bar the entail as soon as it is conveyed to him. So if a sum of money be articulated to be laid out in land, and the lands to be settled in tail, the settlement shall be made accordingly, and not the money paid to the party. But this case would be otherwise, if the remainder in fee had been limited to the tenant in tail, for then it seems that the money shall be given to the tenant in tail; because he may bar the limitation by a fine, which may be levied in vacation time, as well as in term^q. So where money is directed to be laid out in the purchase of lands, to the use of A. and his heirs, A. will be entitled to the money in equity instead of the lands^r.

^q 2 P. W. 171.

^r 3 Atk. 447.

It

It is an established doctrine in chancery, that in case of articles entered into *before* marriage to settle land to one, and the heirs of his body, and a settlement is made *accordingly after* marriage, chancery will rectify it, and direct it to be made in strict settlement, viz. to the first, and other sons of the marriage^s. ^{1 Eq. ab. 387, pl. 7. 392 pl. 2. 3 Atk. 293.} But if both articles and settlement are made *previous* to the marriage, then the articles shall not controul the settlement^t, unless the settlement shall be made *in pursuance* of the articles; in which case chancery will direct it according to the *intent* of the articles^v. ^{Ca. temp. Talb. 20. 2 P. W. 349. 1 P. W. 123.} But it must be observed, that chancery will not direct articles as above to be carried into execution, by making a settlement to the first, and other sons as against *purchasers*, but only between the parties, and their representatives^w. ^{3 Atk. 293.} This rule respecting articles generally holds with regard to executory trusts on devises; therefore the chancery will commonly give the same directions in the case of a trust directed by a will to be carried into execution, as it does in the case of a settlement made in pursuance of marriage articles; that is, if in case of a devise of a trust executory, or of so much money to be laid out in land, and settled upon one, and the heirs of *his* body, there is some clause in the will, which induces the court to believe, that the testator only intended the devisee to take an estate for life, and the heirs of his body to take as *purchasers*, and not by *descent*, it will direct the money to be laid out, and settled according to such apparent intention^x. ^{2 Atk. 570 to 584. 1 P. W. 472. 1 Eq. ab. 183, pl. 30.} Indeed it seems now to be the opinion of some,

some, that the intention in a will, with respect to marking the heirs of the body, words of *purchase*, instead of *limitation*, holds equally in cases of a devise of a *trust executed*, or *legal estate*, as it does in devises of trusts *executory* ⁷.

7 Vide Dougl.
Rep. 327. also
note 1.
2 P. W. 478.

Thirdly, *The nature of the estate of cestuique trust.*

We have already seen in a great measure the nature of the estate of cestuique trust, by considering the nature of trust estates in general. It remains now to shew the power, which cestuique trust has over the estate, with respect to alienation.

In the case of Packer and Wyndham it is said, that every disposition of cestuique trust is binding upon the trustee, not only in *equity*, but at law ². But however the disposition of cestuique trust may be binding upon the trustee in *equity*, (as it certainly is) yet a *trust*, as we have already seen, is not alienable by the rules of the common law ². So cestuique trust may alien the *possibility* of a trust; which alienation will be binding in *equity*, though not at law ^b.

9 Cha. Prep.
415.

9 Dyer, 369. a.
4 Inst. 85.

7 Moor, 806.
1 Cha Rep. 30.
1 Cha. Ca. 8.

9 2 Cha. Ca. 78.

8 1 Vern. 440.

It is a rule, that any legal conveyance, or assurance by *cestuique* trust shall have the same effect, and operation upon the trust estate in *equity*, as it would have had upon a legal estate at law ^c. Therefore if a cestuique trust in *tail* suffers a common recovery, or if he levies a fine (supposing the remainder in fee to be limited to himself) he will completely bar the entail in *equity* ^d. This construction upon the recovery and fine of cestuique trust in *tail* proceeds entirely from *equity*;

equity; for a *trust* is not *entailable at law* within the statute de donis; and as cestuique trust has only an equitable title, he cannot possess those *legal* qualifications, which are required in suffering a recovery, or levying a fine *at law*. But in equity a trust is entailable, and cestuique trust may suffer an equitable recovery, or levy a fine. Indeed a cestuique trust in tail has the advantage of a tenant in tail of a legal estate; for if the trustees join with the cestuique trust, they may bar the entail by a *feoffment*^f. So too^e 2 Vern. 381; it has been said, that a common bargain and sale by cestuique trust is sufficient to bar the entail^g. But that opinion has been contra-^h 1 Vern. 440. dicted^h, and at any rate is liable to objec-ⁱ 2 Vern. 133. tionsⁱ. With respect to an entail of a trust^j 2 Vern. 554. of copyhold lands, where there is no particular custom of the manor to bar the entail of the legal estate tail, it seems, that a *devise*, or *surrender*, is sufficient to bar the entail of the trust^k. ^l P. W. 91.

^m 2 Vern. 283.

As it is a maxim that no conveyance by cestuique trust can work a forfeiture of the legal estate of the trustee^l, it has been held,^l ⁿ Vide 2 Freem. 213. that a fine, or other alienation by cestuiqueⁿ 214. trust for life, does not work a forfeiture of his^m 2 P. W. 147. life estate^m. But we have already had occa-^o 3 Atk. 728, sion to discuss this subject.^o 730.

These few observations on the nature of trusts will, I hope, be sufficient to give an idea of the manner in which they affect conveyances at this day. I shall conclude therefore by citing a rule of equity (which indeed has been before explained) that in every case, the trustee must make good his trust in equity;

equity; and it is said to be the opinion of Lord Hobart, that an action might be had against the trustee at the common law for breach of trust^a; but this opinion seems inconsistent with the idea of trusts, and is contradicted directly by Lord Hardwick^o, who thus expresses himself: "A trust is where
 " there is such a confidence between the parties, that no action *at law* will lie; but is
 " merely a case for the consideration of this
 " court," meaning the court of Equity,

^a 1 Eq. ab.
 384.

^o 2 Atk. 612.

F E O F F M E N T S,

THE preceding account of uses has almost rendered any further enquiry unnecessary, as to their particular operation upon the conveyance by feoffment. I shall only observe in this place, that in order to form a *legal* estate by this, or any other assurance, the use cannot exist separate from the person, who is intended to have that legal estate. Therefore if a feoffment is made to one in fee, without any consideration, or declaration of the use, the use will result to the feoffor ^a; but if any consideration (however insignificant) or express declaration appears, then the use according to the consideration ^b will go to the feoffee, or follow the direction of the declaration ^c. It is said, that if a feoffment is made without consideration or declaration of the use to effectuate a particular *intent*, then the feoffee will be *in* in course of *possession*, and not by way of use; and that after the intent is performed, the use will arise from the feoffor by operation of law ^d. But the whole of this has been explained before. It is worthy of notice, that though upon a feoffment in fee without con-

sidera-

^a 2 Perk. 533.
² Roll. b. 761.

^b 1 Co. 24. a.
² Roll. 787.

788.
^c Shep. T. 496.
 Ander. 37.
 Dyer, 147. a.
² Co. 76. a.

^d Gilb. uses. 16,
 17.
 supra 16, 17.

sideration, or declaration of the use, the use will result, and the feoffor be in of his *old* use, yet if the feoffment gives a larger estate than the feoffor lawfully possessed, and the use is upon such feoffment executed in the *feoffor*, the use will not be executed in him according to the *limits* of his estate *before* the feoffment, but according to the extent of the seisin, which the feoffment acquired. Therefore, if a feoffment is made by tenant for life, &c. to one in fee, and the use in fee is declared to the feoffor, it will be executed in him, according to the extent of the tortious seisin of the feoffee. For a use may be limited to arise out of a tortious as well as a lawful seisin^e. So the use may *result* to the feoffor in a greater estate, than he had in the land, like the case of a recovery, or fine by tenant in tail without any declaration of the use; in which case the use results in fee^f.

^e Co. Litt. 180,
b. 188. a.

^f 9 Co. 8. b.
a Roll. ab. 789.

Having premised thus far, I shall endeavour to give a short account of the nature and particular operation of this conveyance in transferring lands; I must therefore make a digression from the subject of uses, and consider feoffments as deriving their peculiar force from the *common law*. In doing this, we must make uses a kind of secondary consideration.

As feoffments are the most simple, so are they the most ancient species of conveyance. For the original method of acquiring property in lands was by occupancy; and the first mode of transferring it from one man to another, was by the public and solemn delivery over of the possession. Upon this account

Lord

Lord Coke^b gives us an example of a conveyance at a very early period indeed, wherein the very operative word *give*, as in feoffments with us, was used. The conveyance he alludes to was that made by Ephron to Abraham, when he gave him the field of *Machpelah*ⁱ. So when the kinsman of Elimelech gave unto Boas the parcel of land which was Elimelech's, he took off his shoe, and gave it unto Boas in name of *seisin* of the land (after the manner of Israel) in the presence, and with the testimony of many witnesses^k. This mode of conveyance by actual delivery of the lands, must have been very early known among us. But it derived its present name of *feoffment* in consequence of the introduction of the feudal system in England; for it is the *donatio feudi* according to its present acceptation with us^l. At what period, however, whether before or after the Norman conquest, we are to date the establishment of the feudal tenures in this country, has been a point so much disputed, that it is impossible to form a decided opinion concerning that circumstance without differing from some of the most respectable authorities. I shall only observe, that Saltern imagines, that feoffments were in practice even before the Norman conquest^m. It is worthy of the reader's notice, that the term *feodum*, or *feof*, is not only applied to lands, and in corporeal hereditaments, but also to mere *personal* inheritances. Thus, in a convention made between Henry the First, and Robert Earl of Flanders, dated at Dover the 16. of the calends of June 1101, wherein,

^b Co.Litt. 49. B.ⁱ Gen. 23. 11.^k Ruth, 4, 7, 8.
Deut. 25. 9. 10.^l Co.Litt. 9. 2.^m Salt. de Ant.
Brit. Legibus,
cap. 8.

in, the Earl engages to assist Henry, *ad tenendum et defendendum regnum Anglia, contra omnes homines, qui vivere et mori possint*, and the King of England on his part, engages to pay the Earl *unoquoque anno 400 marcas argenti IN FEODO* *. However, when we speak of a *feoffment*, we must understand the word as applying to a conveyance of *lands* only. For Britton on this head tells us, that “ *Don est un nosme general, plus que n’est feoffment; car Don est generale a toutes choses moebles, et nient moebles, et feoffment est riens farique de foil* ”.

* Vide acta regia, 8. in notis.

Wing Britton, Ca. 34.

A *feoffment* may be defined to be a conveyance of *corporeal* hereditaments to another, by delivering of the possession, upon, or within a view of the hereditaments so conveyed †. This ceremony, used in such act of delivery, is in our law called *Livery and Seisin*.

† 2 Comm. 310. Butl. note 1. Co. Litt. 271. b.

The conveyance by *feoffment* was introduced when men were scarcely acquainted with the use of letters; it was necessary therefore that it should be on the land or near the land, in order that the tenants of the manor might be witnesses thereto, who in those days determined in the Lord’s court all controversies relating to such translation †. After the conquest, charters of *feoffment* began to be in use; at first, however, they were drawn up in no regular form; nor was there any uniformity in the style, till the reign of Edward 1st ‡. Still the charter of *feoffment* was by no means a necessary part of the conveyance §: though we may naturally conclude, that men found by experience, that it was the most sure way to

§ 2 Ba. ab. 483.

‡ Butl. note 1. Co. Litt. 271. b.

§ Ba. ab. 483.

to authenticate, and secure the titles to their property. At all times too, a livery of seisin made in pursuance of a charter, was less liable to disputes concerning its validity, than that made on a gift, or demise without a deed. The conveyance of feoffment in *writing* served, as Bracton observes, *ad perpetuam memoriam, propter brevem hominum vitam, et ut facilius probari possit donatio*.^t The legislature has, however, rendered a charter of feoffment equally as necessary as livery of seisin. For now there can be no conveyance of lands, or hereditaments, for more than three years, without writing.^v

^t Bract. lib. 1.
fol. 33. b.

To every feoffment, whether made to create an estate in fee simple, fee tail, or for a man's own, or for another's life, livery of seisin is indispensably necessary^w: and it properly denotes the willingness of the feoffor to part with, and the feoffee to receive, the estate, whereof the feoffment is made.^x This livery of seisin is divided into livery *in deed*, or livery *within view*, or *in law*.

^v 29 Car. 2. c. 3.

^w Shep. T. 206.

^x West. Symb.
part 1. c. 251.

Livery *in deed* is performed by the feoffor's coming upon the land (all other persons being out of the ground) and delivering to the feoffee a clod, branch, or turf, there growing,

"In name of seisin of all the lands and tenements contained in this deed;" or livery in deed may be given by the feoffor's delivering the *charter* upon the land, in the name of livery of seisin of all the lands comprised in the deed^z; or by words only, without any act of delivery, as if the feoffor, being upon the land, says to the feoffee, "I am content

^z 1 Com. 315.

⁹ Co. 138. a.

content that you should enjoy these lands according to this deed^a. But in all cases, where the delivery of the charter is to serve as livery of seisin, it is necessary, that the charter should be delivered in the *name of seisin*, &c. &c.^b for otherwise it will serve as a delivery to perfect the deed, and not as livery of seisin. If the livery of seisin be of a house, the feoffor must take the ring or latch of the door (the house being quite empty) and deliver it in the form above mentioned; and then the feoffee must enter alone, shut the door, then open it, and let in the others^c.

^a 2 Roll. ab. 7. ^b Co. Litt. 48. a. ^c Comm. 315.

In all cases of livery of seisin by deed, a man may either give or receive it by attorney^d. The power to give and receive the livery must be by deed, in order that it may appear, whether it be pursuant to the authority^e. If the deed of feoffment be a deed poll, the letter of attorney may be contained in such deed; but with respect to a deed *indented* the case is different^f. The power of attorney must be executed both in the lifetime of the feoffor, and the feoffee^g. It is said, that when the king made a feoffment, he used to issue his writ to empower his sheriff or other person to deliver seisin: in time other great men did the same; and this circumstance gave rise to powers of attorney^k. The livery *within view*, or *in law*, is when the feoffor is not actually on the land, or in the house, but being in sight of it says to the feoffee^h, "I give you yonder house, enter and take possession;" or by delivering a charter of feoffment *within view* says,

^d Co. Litt. 52. a. ^e 2 Roll. ab. 8. ^f Co. Litt. 52. b. ^g Sed. cont. Cro. Eliz. 905. ^h 2 Roll. ab. 8. ⁱ pl. 12. ^j Co. Litt. 52. b.

^k Butl. note 1. ^l Co. Litt. 271. b. ^m See further as to livery of seisin by attorney, Co. Litt. 52. b. note 2. ⁿ Com. Dig. feoff. B. 3. ^o Ba. ab. feoff. E. ^p Pollexf. 47. ^q Ba. ab. 435.

^r Co. Litt. 52. b. ^s Sed. cont. Cro. Eliz. 905. ^t 2 Roll. ab. 8. ^u pl. 12. ^v Co. Litt. 52. b.

^w Co. Litt. 52. b. ^x Sed. cont. Cro. Eliz. 905. ^y 2 Roll. ab. 8. ^z pl. 12. ^{aa} Co. Litt. 52. b.

^{ab} Co. Litt. 52. b. ^{ac} Sed. cont. Cro. Eliz. 905. ^{ad} 2 Roll. ab. 8. ^{ae} pl. 12. ^{af} Co. Litt. 52. b.

^{ag} Co. Litt. 52. b. ^{ah} Sed. cont. Cro. Eliz. 905. ^{ai} 2 Roll. ab. 8. ^{aj} pl. 12. ^{ak} Co. Litt. 52. b.

^{al} Co. Litt. 52. b. ^{am} Sed. cont. Cro. Eliz. 905. ^{an} 2 Roll. ab. 8. ^{ao} pl. 12. ^{ap} Co. Litt. 52. b.

^{aq} Co. Litt. 52. b. ^{ar} Sed. cont. Cro. Eliz. 905. ^{as} 2 Roll. ab. 8. ^{at} pl. 12. ^{au} Co. Litt. 52. b.

^{av} Co. Litt. 52. b. ^{aw} Sed. cont. Cro. Eliz. 905. ^{ax} 2 Roll. ab. 8. ^{ay} pl. 12. ^{az} Co. Litt. 52. b.

^{ba} Co. Litt. 52. b. ^{bb} Sed. cont. Cro. Eliz. 905. ^{bc} 2 Roll. ab. 8. ^{bd} pl. 12. ^{be} Co. Litt. 52. b.

^{bf} Co. Litt. 52. b. ^{bg} Sed. cont. Cro. Eliz. 905. ^{bh} 2 Roll. ab. 8. ^{bi} pl. 12. ^{bj} Co. Litt. 52. b.

^{bk} Co. Litt. 52. b. ^{bl} Sed. cont. Cro. Eliz. 905. ^{bm} 2 Roll. ab. 8. ^{bn} pl. 12. ^{bo} Co. Litt. 52. b.

^{bp} Co. Litt. 52. b. ^{bq} Sed. cont. Cro. Eliz. 905. ^{br} 2 Roll. ab. 8. ^{bs} pl. 12. ^{bt} Co. Litt. 52. b.

says, " I will that you have the lands that you see there, which are comprised in this deed i." There is this inconvenience attending this mode of livery, viz. no freehold can be vested before an actual entry made by the feoffee^k. Therefore, in case of the death of either the feoffor or feoffee before the entry, the livery is void^l. It may possibly happen, that the feoffee is prevented from making an actual entry by bodily fear; yet still he may make his *claim*, as near to the land as he dares venture, which will be sufficient to vest the possession in him, and render the livery complete^m. It must be observed, that no livery within view can be made or received by attorneyⁿ.

¹ 2 Roll. ab. 7.

^k Co. Litt. 266. b.

^l Co. Litt. 48. b.

^m 2 Roll. ab. 3.
Co. Litt. 48. b.

ⁿ Co. Litt. 52. b.

If a conveyance or feoffment is made of several villages in one county, and seisin is given of parcels of the land in one town, in the name of all the lands in that town, and in other towns, all the lands of the feoffor in that county will pass^o. But if a feoffment is made of lands in different counties, livery must be made in each of the counties^p. However, with respect to livery within view, it may be made of lands lying in different counties^q. So too if livery is made in the name of the whole of a manor which extends to two counties, livery in one county is sufficient^r. Where lands are let out on lease (though in the same county) as many liveries should be made as there are tenants; for no livery can be made without the consent of the tenant; and the consent of one tenant is not the consent of the whole^s.

^o Litt. f. 418.
² Roll. ab. 11.
Perk. f. 226.

^p 2 Roll. ab. 11.
pl. 2.
Perk. f. 227.

^q Co. Litt. 48. b.
² Ba. ab. 486.

^r Perk. f. 227.

^s Dyer 18. a. b.
pl. 106.
² Com. 316.

This ceremony of livery was first instituted, that the *pares* of the county might, upon any dispute concerning the freehold, be able to judge in whom the right was^t. Hence no estate of freehold can be made to commence *in futuro* by feoffment and livery immediately given thereon^v. But on the creation of a freehold remainder, where there is a preceding estate for years, as a lease for three years to A. remainder in fee to B. here if livery of seisin, which must be in *deed*, is made to A. the freehold is immediately created, and vested in B. during the continuance of A.'s term^w. For this is an estate, though to be enjoyed *in futuro*, yet commencing *in presenti*. But there would be no notoriety or evidence, if after livery made the freehold still remained in the feoffor^a; as where A. enfeoffs B. in fee, his estate to commence seven years from that time, or after the feoffor's death. In such case the investiture would rather create than prevent uncertainty.

If livery is made to a lessee for years, remainder to the right heirs of B. this livery is void, because *nemo est heres viventis*^v; and because it is a rule, that no contingent remainder can be supported without a preceding estate of freehold to support it. But if A. leases to B. for years, on condition if B. pays him a certain sum on such a day, then B. to have the fee simple, upon livery of seisin to B. the freehold passes to him^t. But if B. had an estate for *life*, with a like condition, the livery would not have carried the inheritance, till the condition was performed^z.

^t 2 Ba. ab. 486.

^v Co. Litt. 217.

^a Co. 94. b.

² Vent. 204.

^w 1 Comm. 166.

Litt. S. 60.

vide supra.

^a 2 Roll. ab. 7.

pl. 8.

Cro. Eliza. 344.

^v Co. Litt. 217.

^a.

^t Litt. f. 350.

^z Co. Litt.

217. b.

As the design of livery is to denote the change of possession, it must follow, that the possession, which is delivered, should be vacant. Therefore, it is generally true, that every feoffor should have *actual* possession ^a. ^a Co. Litt. 48. b. and where a man has let his lands out on lease, or has them extended on a statute merchant, &c. he cannot, whilst the lessee or conusee is in possession, make a valid feoffment, and livery of them ^b. But this must be understood where they are averse to such feoffment and livery; for where they consent to it it is clearly good ^c. But in speaking of lessees for years, tenant at will and at sufferance are not included; for their consent is by no means necessary ^d. Though the feoffor's lands are out upon lease and extended, yet if he can obtain a clear and actual possession (though they dissent) the livery is valid: and it is immaterial, whether such possession be gained by the lessee's own absence ^e, ^e Dyn. 363. a. or by his ouster by the feoffor ^f. ^f 2 Roll. ab. 4. Yet in those cases of ouster, and absence of the lessee, the possession of any part of the lands by the wife, children, or servants of the lessee, has been deemed sufficient to avoid the livery ^g. ^g Co. Litt. 48. b. And as the servant is supposed to act for the benefit of his master, even his permission will not make good the livery ^h, though, indeed, the subsequent consent of the master will ⁱ. ^h 2 Roll. ab. 5. ⁱ Ibid. As the cattle or other animals of the lessee continue not in the lands, *animo possidendi*, as a servant ought to do for the benefit of his master, they cannot fill the possession, so as to prevent the livery ^k. ^k Co. Litt. 48. b.

A charter of feoffment was found particularly useful, in pointing out the certainty of the limitation of the estate intended to be conveyed by the feoffment and livery, whether that estate was in fee, in tail, or for life; for parol limitations, at the time the livery was made, must ever have been liable to objections and disputes. Yet it has been held, that a parol limitation in making the livery would alter and correct the limitation made in the charter of feoffment. Thus, if the charter was made in *fee*, and the feoffor delivered seisin for *life*, the feoffee could hold but for life¹. But at the same time, as the livery was indorsed, as it always should be, it prevented any uncertainty. However, in this case, if the livery was made for life, *secundum formam chartæ*, the feoffor would nevertheless have had the *fee*, because the livery then had a reference to the deed, which limited the estate in fee^m.

¹Co.Litt.222.b

^mCo.Litt.48.a.
227. b. 331. a.

These remarks, it is hoped, will afford a sufficient knowledge of the general rules relating to livery of seisin. For, according to the present disuse of this conveyance by feoffment, there are very few other cases to be found on this subject of any real use. Those, however, who wish to search more minutely into this learning, are referred to the authors cited below*.

This mode of conveyance by feoffment is certainly now very rarely resorted to. Upon this account a more thorough investigation in

* Vin. ab. tit. feoff. 2 Ba. ab. feoff. 2 Roll. ab. feoff. Com. Dig. feoff. West. Symb. pl. 1. f. 235 to 264. Shep. T. 199 to 217.

in the foregoing pages, of the manner of giving and receiving livery and seisin, has been thought unnecessary. Still, however, it is not an *obsolete* conveyance; for in some cases no other assurance can at all, or at least so well, effectuate the purpose for which it is intended. The operation of this conveyance then by feoffment in those particular instances will be the subject of our inquiries. Sir William Blackstone, I must observe, complains of the want of notoriety in all of our modern species of conveyances, and laments the disuse of public investitures. This is the general remark of almost all of our law writers. But perhaps the inconveniences arising from the present manner of conveying property are not more prejudicial to the community at large, than the antient one of conveying by feoffment and livery of seisin, especially if we consider the many and nice laws relating to livery of seisin, the omission of any, in the making of which, might vitiate a deed, or at least it might drive the parties into a court of equity for relief. But in the conveyance by lease and release, bargain and sale, and covenant to stand seised, all the niceties required in making livery of seisin are avoided. Though indeed these latter conveyances are of a more clandestine nature than feoffments, yet in many respects they are much more useful and convenient, not only to the parties themselves, but to practitioners. If, for instance, a charter of feoffment is signed, sealed, and delivered, still it is not perfected till livery of seisin is made; and possibly, if the lands are at a great distance,

• Vide Hilknote.
Shep. T. 217.

distance, or the attorney to deliver seisin is idle, the feoffor or feoffee may die before livery of seisin is made, in which case the deed is utterly void. But in these conveyances to uses, the use is executed in the grantee by the vesting of the use, without the trouble of an actual entry by the grantor or grantee.

It may not be improper here to notice the operation of a feoffment in barring *contingent remainders*. This quality, though annexed to a fine and recovery, is not affixed either to a bargain and sale, lease and release, or a grant[†]. In Archer's case[‡], where lands were devised to A. for life, and to the next heir male of A. and the heirs male of the body of such next heir male (which limitation was deemed a contingent remainder to the son of A.) it was held, that the feoffment of A. destroyed the contingent remainder to his next heir male. So too if there be a tenant for life, remainder to the right heirs of J. S. and the tenant for life makes a feoffment during the life of J. S. here the particular estate for life is determined, and the contingent remainder to the heirs of J. S. destroyed[§]. But here we are to observe, that it is a rule, that every act which a tenant for life commits to the destruction of his particular estate, is a forfeiture of that estate[¶]. And though in the preceding cases the contingent remainders are destroyed, yet as the tenant has done a tortious act, his estate is liable to be forfeited. The question then will be, who is to take advantage of this forfeiture. That point, though once
much

† 3 Will. 245.

‡ 1 Co. 66. b.

§ Litt. Rep. 160.

¶ Co. Litt. 251.

¶

much litigated, is now pretty clearly settled: it is agreed, that where an estate for life is limited with a contingent remainder over *in fee*, all *subsequent* remainders must be contingent also; and consequently a feoffment made, or recovery suffered by the tenant for life, will effectually bar all the remainders in contingency ^w. But then, according to a rule, that where the remainders are so limited in contingency, the fee simple of the lands remains in the *grantor*, till the contingency happens, when the tenant for life makes a feoffment, or suffers a recovery to bar the contingent remainders, the *grantor* and his heirs may enter for a forfeiture ^x. ^w 1 Salk. 224. Loddington v. Kyme. Lord Raym. 203. S. C.

To construe the fee simple to remain in the grantor, and his heirs, after a limitation of a contingent remainder *in fee*, is to favour a rule, which we before have had occasion to mention, when treating of the doctrine of uses; namely, that so much of a use as a man does not dispose of remains with him; therefore, if a feoffment is made in fee, to the use of the feoffee for life, the remainder of the use in fee undisposed of results to the feoffor. To apply then this rule to the limitation of a contingent remainder in fee: if a man makes a feoffment, suffers a recovery, levies a fine, or conveys by lease and release to A. in fee, to the use of B. for life, remainder to the use of the right heirs of C, who is then living; in this case the use to B. for life is executed by the statute; but as there is no person to answer the description of the right heir of C. whilst C. is alive, the limitation of the use to the right heirs of C, cannot

^x 1 P. W. 505.

^{515.}
Carter v. Bar,
Hardiston,

cannot be executed according to the express words of the statute^a. As the use then does not execute in cestuique use in contingency, it must then remain until the vesting of the contingency in the grantor; for until that time he has not disposed of it. Lord Coke^a has expressly directed this construction to be made, and I have particularly endeavoured to explain the reasons of it in another place^b. It is unnecessary to add, that if B. in the above case should die before C. (in which case the remainder to the right heirs could never take effect) then the remainder of the use in fee would remain and be executed in the grantor. This, indeed, is but adhering to the case of a grant at common law, for if a *lease* is made to A. for life, remainder to the right heirs of B. and A. dies, living B. the grantor shall have his lands again^c. However, in the case of *Vick v. Edwards*^d, where lands were *devised* to A. and B. and the survivor of them (which limitation gave a joint estate for life to A. and B. with a contingent remainder to the heirs of the survivor) in trust to sell, Lord Talbot is reported to have said, that the trustees might pass a good title to a purchaser by a fine, without the heir of the testator joining in such fine. By this construction Lord Talbot seems to have thought, that the fee simple did *not* remain in the heir of the testator, till the contingency happened, by the death of A. or B.; for otherwise the fine, without the concurrence of the heir, would not have barred his title of entry for the forfeiture, according to the maxims just mentioned.

But

^a Vide supra, 139.

^a Co. Litt. 23. a.

^b Vide supra, 134 to 138.

^c 2 Roll. ab. 418. pl. 1, 2. cites 11 H. 6. 12. b. 3 P. W. 372.

^d 3 P. W. 372.

But this opinion, in the case of Vick and Edwards, is certainly objectionable: for in the case of Carter v. Barnardiston, it was determined, that where the inheritance is *devise*d in contingency, it descends to the testator's heir at law, till the contingency happens, if not otherwise disposed of^c.

^c Vide: Fearn, 516 to 526. last edit.

It is observable in these cases, that if the donor or his heir, or the heir of the testator (in the case of a devise) is willing to join in a conveyance with the donee or devisee, they can by a lease and release, or bargain and sale, effectually destroy the contingent remainders, and transfer a good title to a purchaser^e. By this method the life estate is merged in the reversion, which always destroys the mean contingent remainders^h.

^e Butl. note 1. Co. Litt. 191. a.

^h 2 Saund. 386.

When there is an estate limited for life, with a contingent remainder *in tail to the issue* of tenant for life, remainder over to another in fee, in this case the remainder over *in fee* is not *contingent*, but *vested*ⁱ; and differs^j therefore from the case where the contingent remainder after the estate for life is *in fee*, and not *in tail*. Thus^k, if an estate is limited to A. for life, with a contingent remainder *in tail* to his issue, remainder over to B. *in fee*, if A. makes a feoffment, suffers a recovery, or levies a fine, the contingent remainder to his issue is totally destroyed; but as B. has a *vested* remainder in fee, he may *enter* for a forfeiture. Here too, if B. the remainderman, and tenant for life, join in a common conveyance of lease and release, or bargain and sale, the intermediate contingent remainders are annihilated, notwithstanding each of them

^j 3 Willon, 246.

^k Doe v. Reason, cited 3 Will. 244.

them gives such estate only, as he lawfully may grant, and though there is no divesting of any of the estates¹. For whenever the particular estate or inheritance unites by the conveyance, or act of the parties, the particular estate is merged in the inheritance, and the mean contingent estates are destroyed. But if there be tenant for life, with a contingent remainder in tail, with a limitation in the same conveyance to the right heirs of the tenant for life, though the estate for life and the inheritance are vested in one and the same person, yet they are not so executed in him as to merge the particular estate, but executed *sub modo* upon condition to open and separate, when the contingency happens^m.

^m 1 Fearn, 507, 508. last edit.

The seisin of the feoffees in fee is, as it were, a foundation to build uses upon; and when this foundation is properly laid, the feoffor may model and shape the uses into a variety of forms. Thus we meet with springing, shifting, and contingent uses. There is, however, a species of shifting or springing use, which we have not as yet noticed, and which takes effect by the execution of a power or authority reserved to a particular person. Thus are powers of revocation and appointment². When the use arises from an event provided for by the deed, it is called a future, contingent, or springing use: of this kind are the cases mentioned in a former page. But when the use is to arise from the act of some agent or person nominated in the deed, it is called a use arising from the execution of a power. In fact, as Mr. Booth ob-

² Vide Moor, 808. pl. 842.

Supra. 174 to 196.

³ Vide Mr. B.'s opinion at the

serves³, both are future, or contingent uses till

till the act is done; and afterwards they are, ^{end of Hill. S. T.} by the operation of the statute, *actual* estates. It will be necessary, therefore, in this place to consider the nature of powers in general, and the force of this species of conveyance by feoffment in extinguishing such powers. Powers are usually divided into powers *collateral*, in *gross*, and *appendant*. Powers *collateral* are such as are given to strangers, who have neither a present nor a future interest in the land ^a. Thus powers to raise, ^{a Co. Litt. 237.} or limit uses, when reserved to strangers, ^{a. Hard. 415.} are merely *collateral* ^o. Such powers, as are ^{Hard. 415.} merely collateral to the land, it is agreed, ^{Gilb. uses, 144.} cannot be released, or extinguished by feoffment, fine, or any other conveyance ^p. Neither can the person, who has such a power reserved to him, disable himself from exercising it. Therefore, if a stranger, with a power of revocation, makes a feoffment, levies a fine, or suffers a recovery, and then revokes, the person claiming under the revocation is in by, and immediately under the original settler; and therefore, as he does not claim under, so he is not barred by the act of the feoffor, conusor, or recoverer ^q. Or if a ^{a Butl. note 1.} feoffment be made by A. in fee to divers ^{Co. Litt. 342.} uses, with a proviso, that if B. shall revoke, the uses shall cease, there B. cannot release the power; and a fine levied, or a feoffment made by him, will not extinguish it: for the power of B. is merely collateral; and the land does not move from him, nor is the party in by him, nor under him ^b. So in the ^{b 1 Co. 174. a} case of a power to executors to sell, a feoffment made by them of the premisses will not
 extin^a

extinguish their power, but they may afterwards sell notwithstanding^r. Thus too in the case of *Willis v. Shorral*^s, Lord Hardwicke held that a power, vested in a stranger to create a term of years for raising a sum of money upon a certain event, could not be barred by a feoffment made, or fine levied by the person who claimed the lands, subject to the power. In the case of *Saville v. Blacket*^t, where A. was tenant for ninety-nine years, if he should so long live, remainder to trustees during the life of A. to preserve contingent remainders, remainder over, with a power for A. to charge the lands with divers sums of money; Lord Macclesfield held, that this power to charge the land was merely *collateral*. He however held, that a recovery, suffered by A. the trustees, and remainder-man in tail, would effectually destroy the power. But he was of opinion, that if A. had *assigned* over the whole term, the power of charging would have still subsisted.

A power in *gross* is such as is given to a man, who has an estate in the land; but the estate to be created under the power is not to commence, until the determination of the estate, to which it relates^v. Thus if there be tenant for life, with a power to make a jointure on an after-taken wife; this power is a power in *gross*^w; so is a power given to a tenant for life to make a lease to commence after his death, to raise portions for his daughters^x. Now if the tenant for life in these cases makes a feoffment, by which he acquires a tortious fee by disseisin, the power

is

^r 1 P. W. 170.
^s Co. 111. a.
^t 1 Atk. 474.

^v 1 P. W. 778.

^w Gilb. uses,
 142.
 Bu. l. note 1.
 Co. Litt 342. b.

^x Ibid.

^y Gilb. uses,
 142.

is thereby entirely extinguished ¹. For as ² Hard. 416. the power is to take effect out of the remainders, he prevents the execution of it, by disposing of the whole seisin and estate by the feoffment; but if the tenant for life with such a power conveys only his life estate, then it seems, that the power is not extinguished: for the execution of the power does not fall within the compass of the life estate. Therefore, if the tenant for life conveys by lease and release *in fee*, or bargains and sells *in fee*, or covenants to stand seised in fee, he does not by any of these conveyances destroy the power; for it is their nature only to pass what the tenant lawfully might pass ³.

It was said by Lord Hale ⁴, in the case of Edwards v. Slater, that a power in *gross* may be destroyed by a release to the person in remainder. So if there be an estate for life limited to A. remainder to such uses as he shall appoint, remainder to A. in fee; here, as the whole fee is in A. the terre-tenant, subject to the appointment, if A. conveys the fee by lease and release (which he may lawfully do) he will thereby extinguish the power ⁵.

The reason why a feoffment bars a power in gross, arises from the forcible operation of that conveyance; for it not only disturbs the seisin, out of which the uses under the power are to arise; but it also has the peculiar quality of excluding the *feoffor* not only from all *present*, but also all *future* rights and titles. Upon this account it was, that if the husband made a discontinuance of the wife's land, and had taken back an estate to him, and

¹ Hard. 416.
² 412, 414, 416.
³ Hard. 416.

⁴ Butl. note v.
Co. Litt. 342. b.
under fol. 343.
b.

and his wife, by which the wife was remitted, and they had issue, and the wife died, yet the husband should not have been tenant by the curtesy; for he had extinguished his *future* right by the livery ^c.

^c 4 Leon. 135.
cites 9 H. 7. 1.

Powers of *revocation* are also termed powers in gross. And in cases where there is tenant for life, with a power to revoke the old, and to limit, and appoint new uses, a feoffment made, a fine levied, or recovery suffered, will entirely extinguish the power. So if A. makes a feoffment to divers uses, with a power of revocation reserved to A.; here if A. makes a feoffment, levies a fine, or releases, the power will be extinguished ^a. It

^a 1 Co. 174. b.

must be observed, that if there is tenant for life, with a power of revocation, remainder over, if tenant for life, without revoking the old uses, makes a feoffment in fee, &c. this regularly is a forfeiture of his life estate, and not a proper revocation and execution of the power. Therefore, in the case of *Herring v. Brown* ^d, where A. tenant for life, with several remainders over, with a power of revocation, levied a fine, and then by a deed sealed ten days after declared the uses of the fine, which deed had the circumstances required by the power; the question was, whether the fine extinguished the power, and thereby forfeited the estate, or whether the fine and deed should be taken as one conveyance, and so be a good execution of the power? In the king's bench it was held, that the fine extinguished the power, and that the deed came too late. But this judgment was reversed ^e in the exchequer chamber; where it was deter-

^d 1 Vent. 368.
^e 2 Shower, 185.

^e Carth. 23.

determined, that the fine, and declaration of the uses, were to be considered as one conveyance, and operated as an execution, and not as an extinguishment of the power; that a fine alone, without a deed to declare the uses of it, would have extinguished the power; yet it was otherwise where there was a deed declaring the intention of the parties.

So in the Earl of Leicester's case^f, where ^{f 1 Vent. 278.} A. levied a fine to the use of B. and his heirs for payment of debts, reserving a power to himself (viz. to A.) to revoke the uses by any writing indented, or by his last will, subscribed with his hand, and sealed with his seal. Afterwards A. covenants by writing, sealed and subscribed as aforesaid, to levy a fine to other uses; and after the covenant, a fine was levied accordingly. It was resolved by the whole court, that the deed, and the fine, taken together, served as a sufficient execution of the power.

But in Digge's case^g, where A. being tenant for life, with remainders over, with a power of revocation and of appointment upon such revocation, by bargain and sale revoked the old uses, and limited new ones: but *before* the bargain and sale was enrolled, A. levied a fine: it was resolved, that as the fine was levied before the deed was enrolled, and consequently before its completion, the power was extinguished. A feoffment would have had the same operation in destroying the power, as the fine, as appears from Albany's case^h.

A per-

^{g 1 Co. 173. a.}
^{Moore, 603.}
^{h 1 Co. 110. b.}
^{4 Leon. 133.}
^{Moore, 605.}

A person, who has a power of revocation reserved to him, may revoke part at one time, part at another, and so of the residue, till he has revoked the whole^l. But a power of revocation can only be once exercised, unless a new power of revocation is reserved, as to the uses newly limited^k. As a power of revocation may be exercised, as to part of the land, so may it by feoffment or fine be destroyed as to part, and yet left good as to the residue^l.

^l 1 Co. 173. b.
Moor, 605.

^k 1 Co. 173. b.

^l Moor, 605.

We are here to observe, that if there be tenant for life, with remainders over, with a power to revoke the old uses; yet if there is no power reserved to him to limit new ones, he cannot, by the same deed with which he revokes, make a new limitation of the uses, unless there be new words of conveyance, or a *covenant to stand seised, on consideration* expressed in such deed of revocation. Therefore in a case^m, where A. suffered a recovery to the use of himself for life, remainders over, with a power of revocation reserved to himself: A. revoked the old uses, and by the same deed limited new ones; but in limiting the fresh uses, there were neither of the requisites just mentioned: the court held, that it was true, he might by *will*, or any *new conveyance*, have made a new disposition, and even if in the *same deed* there had been a *new grant*, or *new covenant* upon consideration expressed, it would have been sufficient for that purpose: but as the tenant for life had made only a *declaration*, by which he had limited new uses, as under the recovery, such declaration was void; for the uses of the recovery

were

^m 1 Strange,
584. Anon.

were full before, and the power was *only* to *revoke*, and not to *limit new uses*. But if the power is not only to *revoke*, but also to *limit new uses*, then it seems, that the revocation of the old, and the limitation of the new uses may be effected by one and the same deed, without a *new grant*, or covenant to stand seised on consideration expressed^a.

If a conveyance is made to one for life, remainders over, with a present, or (according to the case of *Standen v. Bullock*^b) a *future power of revocation* and then the tenant for life, without revoking the former uses, bargains, and sells in fee to a purchaser, the statute 27 Eliz. c. 4. s. 5. makes void the conveyance, by which the power is created, as against the purchaser: or rather, as it has been expressed, it supplies the office of the person, who ought to have revoked, but did not^c. But in the case of *Bullock v. Thorne*^d (which appears to be the same case as is cited in Coke's reports, under the name of *Standen and Bullock*) it was agreed by the judges, that if a person, who has a power of revocation, extinguishes or suspends that power of revocation for a *part* only, he may still revoke as to the residue of the uses^e. According to this opinion of the judges, we may venture to conclude, that if a tenant for life, with a power of revocation, makes a lease for *years*, or indeed for *life*, he may notwithstanding exercise his power of revocation, as to the residue of the uses, after the determination of the lease for years, or life^f.

^a 1 Co. 174. d.
Moor, 608. pl.
842.

^b 3 Co. 82. b.
cited.

^c Moor, 616.
617.
Vide 3 Co. 82. b.
^d Moor, 615.

^e Moor, 618.

^f Vide 1 P. W.
170. also
T. Jones, 392.

Powers *appendant* (which are always annexed to the estate) are such as are to be created, and take effect during the continu-

¹ Bull. note f.
Co. Litt. 342. b.

ance of the estate to which they are annexed¹. Of this kind, are powers reserved to tenants for lives to make leases. With respect to these powers, as they cannot be transferred over, or even be executed by another as attorney, it seems that any conveyance, which *wholly* transfers the estate of the tenant for life, must entirely destroy them^v. Therefore

^v 9 Co. 76. a.
1 Roll. ab. 330.
1 P. W. 778.

not only a feoffment, fine, or recovery will have this operation, but also a bargain and sale, lease and release, covenant to stand seised, or assignment^w. However, if the tenant for life, with such a power, makes a conveyance, by which he does not part with his *whole* life estate, then it is agreed that the power is not extinguished. This is explained

^w Vide Hard.
415, 416.

^x Doug. Rep.
292. 2d edit.
Ren. lessee of
Hall v. Bulkeley.

in a late case^x; where A. being tenant for life, with a power to make leases, conveyed his life estate by lease and release to B. and his heirs, in *trust* to apply the profits in payment of an annuity to J. S. during A.'s life, and the *surplus* of the rents and profits to A. The year following A. conveyed his estate to trustees for ninety-nine years, if he should so long live, for payment of his debts; with an express reservation of all leases granted, or *to be* granted by him. Afterwards A. made a lease pursuant to his power. The question therefore was, whether the *first* conveyance to B. destroyed the power. It was argued, that by the conveyance to B. the power was extinguished, so far as respected A. as effectually as if a feoffment had been made, or

reco-

recovery suffered. It was also suggested that if the subsequent *lease* to A. should be established, the decision would shake a great many titles; for that conveyancers considered the grant of a life estate extinguished a leasing power; reserved to the tenant for life. But Lord Mansfield held, that *powers* came into the courts of common law with the statute of uses, and the construction of them, by the express direction of the statute, must be the same as in courts of equity: that the *creation, execution, and destruction* of them, depended on the substantial *intention* of the parties. His lordship observed, that it was said, 1st. That the grantor, in the principal case, was not in *possession*, and that it was necessary he should be, in order to execute the power. But as to that objection, he thought, that *possession*, in the case before him, only meant the receipt of the rents and profits, which were applied to A.'s use. If *actual* possession was necessary, a leasing power could never be executed, where lands were in the hands of a tenant. 2dly, It was contended, that by granting away the life estate, the power was extinguished. Certainly it would be, said his Lordship, if the *whole* life estate had been granted away by the *intention* of the parties. But the conveyance in this case was only to let in a particular charge, subject to which the rents and profits still belonged to A. And the lease could not prejudice the annuity, or the remainder-man, for the best rent was reserved. He therefore held, that the leasing power was not extinguished by the conveyance to B.

It only remains to observe, with respect to leasing powers, reserved to tenants for life, that they can only be created on such conveyances, as operate by way of transmutation of possession. Therefore, if a man covenants to stand seised to the use of himself for life, with remainders over, with a power reserved to the covenantor to make leases¹; or if a man bargains and sells to one for life, reserving a power to the bargainee to make leases², in either case the power is void in its creation; for the consideration which raises the use in the first instance extends only to the covenantor, and those in remainder of his blood. And in the latter case, the consideration only reaches to the bargainee; whilst the reversion, expectant on the estate for life, is wholly in the bargainor, for want of a consideration to take it out of him. Therefore the lessees, not being within the consideration of the conveyances, cannot possibly take by virtue of the powers. But as to a feoffment, fine, recovery, and lease and release, as the uses on them are fed out of the seisin of the feoffee, donee, recoveror, and releasee, it is not the *consideration*, but the *declaration*, which directs the use to the lessees by virtue of the power.

It was observed in a preceding page, that a springing or shifting use cannot be barred by a feoffment, fine, or recovery, unless the seisin, out of which they are to be served, when they come in *esse*, be disturbed; as in the case of a covenant to stand seised to the use of such a person, at such a time. In
which

¹ Moor, 144.
pl. 287.

² Foph. 81.

which case, till the contingency happens, the use in fee results to the covenantor; and the covenantor, before the use vests, may by a feoffment prevent its ever taking effect ^a. ^a *Supra*, 192.

But though a man cannot bar a shifting, or future use to a third person, yet he may exclude himself by a feoffment from all future uses, and possibilities. Thus in a case ^b, ^b 1 Leon. 33. pl. 40. where J. S. covenanted to convey lands to the use of himself in fee, until such time as he the said J. S. his heirs, executors, or administrators, should make default in payment of a certain sum, and after such default to the use of the queen, her heirs and successors, until her heirs and successors should receive a certain sum; after which period to the use of J. S. and his heirs for ever; J. S. levied a fine to those uses; and afterwards, being seised accordingly, he *bargained* and *sold* the lands to a stranger. Default was then made in payment of the money; the queen seized the lands, and granted them over to another, and his heirs, *quousque* the money be paid. Afterwards J. S. paid the money; and the question was, whether he could have the lands again, contrary to his own express bargain and sale. It was resolved, that as J. S. at the time of the bargain and sale had an estate in fee, *determinable* upon a default of payment, according to the first limitation of the use, so that determinable fee only passed by the bargain and sale, and not the *new* estate, which accrued by the latter limitation after the money paid, for *that* was not in *esse* at the time of the bargain and sale. But if J. S. had conveyed by *feoffment* or *fine*, ^c vide on the same subject, 1 Co. 174 b. 111. b. 112. a. b. Hob. 337.

fine, then he would have barred himself from ever taking under the latter limitation of the use.

A feoffment bars the feoffor of all interest in the lands, such as rents, common, and the like ^c. It also bars him of the benefit of a condition of re-entry, writs of error, and attaint, &c. ^d

Shep. T. 199.

^d Ibid. 200.

^e Co. r12. a. b.

So if a man has an estate of inheritance in his own right, and a lease for years in right of his wife, and makes a feoffment of the land; by the feoffment, not only the inheritance, but the interest in the term of years, which the feoffor had in right of his wife, also passes ^e. But in this case, if the grantor had conveyed by bargain and sale, as the use first passes by that conveyance, and then the possession is executed in the same manner as the use is transferred, the lease in *jure uxoris* could not pass by the bargain and sale ^f. So, it seems, if A. has a rent charge out of the manor of D. in right of his wife, and afterwards purchases the manor; here, though a feoffment by A. of the manor will pass the rent charge, yet a bargain and sale will be insufficient for that purpose ^g.

^e 1 Leon. 5. ca. 10. Stonely and Bracebridge.

^f Moor, 171. pl. 304.

^g 1 Leon. 6.

^h Supra, 92.

We have before had an opportunity of seeing ^h, that if a man, seised *ex parte materna*, makes a feoffment without any consideration, or declaration of the use to the feoffee, whereby the use results to the feoffor; or if the use is expressly declared to the feoffor; in either case the feoffor is *in* of the *old* use, and consequently the use and the lands will descend to the heirs on the mother's side. However, if a tenant for *years*, or *life*, makes a feoff-

a feoffment in fee, by which he gives a seisin in fee to the feoffee, and the use either results or is declared to the feoffor in fee, in this case the feoffor is not in of the *old use*; for if he was, he would be in of his *former estate*, which was but for a term of years, or life; whereas the use results in fee. The use, arising out of the tortious seisin of the feoffee, is altogether an entire *new use*. Therefore, if a tenant for life or years makes a feoffment, and declares the use to himself according to the extent of the estate, which he had previous to the feoffment, yet still it shall be a forfeiture of his estate for life, or yearsⁱ; for the use is not served out of the former estate for life, or years, but out of a newly acquired seisin. In passing this seisin the feoffor has also transferred his prior estate; and thereby merged and extinguished it in the fee, which is produced by the feoffment^k.

Vide Martin on Dem. Tregonwell v. Strachan.

² Stra. 1179.
³ Will. Rep. 66.

⁴ Carth. 23.

^k Vide Jenk. Gent. 267.

I must here observe, that a feoffment is the only conveyance, by which a tenant for years, by elegit, statute merchant, or staple, or a coppholder, can create an estate of freehold by disseisin^l. The utility of the conveyance then by feoffment, in this instance, exceeds all other conveyances. As to a recovery, there is an absolute necessity, that there should be a tenant to the freehold, against whom the writ of entry is to be brought^m. And as to a fine, if a tenant for years, &c. levies a fine without previously creating a freehold by a feoffment, the fine may be avoided by pleading *partes finis, nihil habuerunt*ⁿ.

^l Co. Litt 49 a.

^m Vide Cruise, 18.

ⁿ 1 P. W. 519.

³ Atk. 562.

¹ Vent. 241.

These

These remarks lead me to make some short enquiries into the nature of estates of freehold created by disseisin, and the operation of a feoffment by tenant for years, &c. in acquiring such estates. The disseisin alluded to may be defined to be, where a man being in possession by lawful means, as a tenant for years, &c. by a tortious act disseises the owner of the fee of his freehold^o. That a feoffment should have had the peculiar quality of creating a freehold by disseisin, we cannot wonder at, if we consider its nature. To make a feoffment valid, nothing is wanting but a *possession*; and where the feoffor has *possession* though it be a *bare* and *naked* one, yet a freehold or fee simple passes by reason of the livery^p. Now a lessee for years has to all intents and purposes this requisite, viz. *possession*. In this respect the feoffment of the lessee is more valid than that of the lessor without the consent of the lessee; therefore, a feoffment by a lessee for years passes the freehold, though the lessor be upon the land; because whilst the lease is in force, the lessor has nothing to do with the possession^q.

^o Co. Litt. 330. b

^p 1 Burr. 92.

^q Perk. f. 200.

^r Burr. 94.

^s Vide Carter, 66.

Butt. note 1.

Co. Litt. 330. b.

Cowper, 703.

^t Ibid.

We need but recur to the principles of the feudal system, with respect to the situation of the lessor and lessee, in order to place the reasons of the above construction in a still more accurate point of view. By the feudal law the possession of the tenant was held to be the possession of the freeholder^r. The freeholder was equally exposed to the loss of his freehold by the act of his tenant, as by his own act^s. Thus, if he permitted him-

himself to be disseised¹; if he aliened^v, if he claimed the fee, or if he affirmed it to be in a stranger^w—in all these cases the possession of the freeholder was liable to be lost. The same relation was held between the freeholder and tenant, in the transfer of the possession and freehold. The delivery of possession by feoffment and livery of seisin, was the only thing necessary. Now, as the tenant came in solemnly by the act of the freeholder, and as there subsisted a relationship and privity between them^x, he could, on account of the notoriety of livery of seisin, convey that possession, which was entrusted to his care by the freeholder. So much indeed was the actual tradition of the possession of the land by publick investiture esteemed, that whilst the tenant was in possession, the freeholder himself could not make a feoffment with livery of seisin, unless the tenant gave his consent^y. However, if the tenant aliened the fee, he created a forfeiture of his particular estate, for having betrayed the trust reposed in him, by transferring the seisin, out of which his particular estate was carved^z. In process of time, this power of aliening the fee, or creating a freehold by disseisin, was not confined to a tenant for years. For tenants by elegit, statute merchant, staple, at will, and at sufferance, could transfer the freehold by a feoffment and livery of seisin^a. In short, all those who had a possession, however tortious or slender it might be, could by a feoffment vest an estate of freehold in their feoffees; such were disseisors, abators, and

¹ Vide Gilb. T.^{93.} Bro. diff. 3.^v Bntl. note 1.
Co. Litt. 33a. b.^x Ibid.
Cowp 703.^v Co. Litt. 48. b.
Dyer, 33. a. b.
supra.^z Co. Litt. 251.
^a b.
ⁱ Burr. 109.^a Bro. diff. pl.
64.

ipz

^a Brad. lib. 2.
fol. 37. a. fol.
11. b.
^c 2 Inst. 413.
^d Burr. 93.

intruders^b. Therefore Lord Coke^c, in his commentary upon the 25th chapter of Westm. 2d (which gives a writ of *novel disseisin*, where tenant for years aliens in fee by feoffment) says, that though the act speaks of an alienation by feoffment by a tenant for years, yet it extends to tenant by *elegit*, statute merchant, statute staple, tenant at will, and tenant at sufferance; because all those have a *possession*. But, he adds, it is otherwise of a *bailiff*; for he has *no possession*. So if a tenant for years makes a lease for *life* with livery, remainder in tail, and the tenant for life enters; not only the tenant for life is deemed a disseisor, because he accepts of the livery, but if after his death the remainder-man enters, such entry is accounted a disseisin^d.

^e Bro. diff. pl.
86. 3.

^f Hunt. v. Burn.
cited 1 Burr. 93.
9 H. 6. 24.
10 H. 8. 10.
also cited 1 Burr.
94, 95.

It is very clear from the authorities above cited, and those placed in the margin^e, that a feoffment by tenant for years, &c. has the peculiar operation of creating a freehold by disseisin. This estate of freehold, when created by disseisin, is sufficient to support a fine levied thereon; but unless a tenant for years, &c. previously makes a feoffment, the fine may be avoided by pleading *partes finis, nihil habuerunt*, as was before observed^f. However it may not be amiss to cite the several cases, which confirm this doctrine respecting the operation of a feoffment made by a tenant for years, &c. with a fine levied thereon.

^g Supra. 305.

^h 17 H. 8. 20.
ⁱ 1 Burr. 95.

Thus in a case^g, cited by Mr. Knowler^h, where cestuique use, before the statute of uses, conveyed the use by *bargain and sale*, and afterwards levied a *fine* to a *stranger*. The question

question was, whether the fine was not void, as neither of the parties had any thing in *use*, or *possession*; for by the bargain and sale the use was in the *bargainee*; and nothing was in the *bargainor* or *stranger*. It was argued, that if the fine was not good, great inconvenience would follow; for that many recoveries had been suffered against the bargainor, after he had conveyed the use. To this Fitzherbert replied, that it was the folly of purchasers, not to take a *feoffment* from cestuique use, before the fine was levied: for if they did, the *fine* would be *good*. For his part, he said, he would never purchase any land without taking a *feoffment*; so that he might be in *possession* when the fine should be levied; for then the fine would be *undoubtedly* good. In this case it is observable, that after the bargain and sale, cestuique use had neither any thing in the use or possession; and therefore he was not to be considered as tenant at *will* to the feoffees: and yet Fitzherbert thought that if he had previously made a feoffment, this would have created a sufficient freehold to support the fine levied to the stranger. The feoffment by the bargainor, after the bargain and sale, could not have been warranted by the statute 1 Rich. 3. c. 1. supposing he had made it to the stranger; because, after that period, in fact he was not *cestuique use*. This case, I think, shews in a very pointed manner the force of a feoffment and livery.

In the case of Whaley v. Tancredⁱ, where a lessee for years made a feoffment, and levied a fine; the question was, whether the lessor

ⁱ 1 Vent. 241,
T. Raym. 219,
vide 1 Atk. 571.

lessor was barred by the fine and non-claim from the time the fine was levied; or whether he was included in the second saving of the statute 4 H. 7. and should thereby be allowed to claim the lands five years after the expiration of his term? It was resolved, that when a lessee for *years*, as well as a lessee for *life*, levies a fine, the reversioner shall have five years to make his claim after the expiration of the term, or life estate. In this case, we see, there was no doubt suggested as to the validity of the feoffment in creating a freehold to support a fine; but the scruple was, at what time the feoffment and fine should bar the reversioner of his interest?—Agreeable to the doctrine in this case, the Lord Chancellor Hardwicke, in the cases of *Shields v. Atkins*^k, and *Earl of Pomfret v. Lord Windsor*^l, was of opinion, that if a lessee for years or at will makes a feoffment with livery, and then levies a fine, it will be a bar after five years run beyond the title accrued. Lord Coke^m also, in speaking of a copyholder (who is in the nature of a tenant at will to the lord) says, if a copyholder makes a feoffment in fee, and the feoffee levies a *fine*, with proclamations, and five years pass, the lord is barred.

But where a tenant at will, copyholder, or lessee for years, makes a feoffment, and levies a fine, and still continues in *possession*, paying rent, and performing the services, this will be accounted a fraudulent circumstance, and prevent the feoffment and fine from barring the owners of the inheritance. Thus, in *Fermor's case*ⁿ, where R. F. seized of the

^k 3 Atk. 562.

^l 2 Vezey, 481.

^m Co. Law Tracts, 126.

ⁿ 3 Co. 77. a.

manor of S. leased some lands, parcel of the said manor, to J. S. for *years*, who also was possessed of other lands at the *will* of R. F. and held lands of the said manor by *copy* of court roll, J. S. made a feoffment with livery to C. for life, and then levied a fine with proclamations. J. S. continued all the time in possession, and paid the rents to R. F. And it was resolved, that as the feoffment was made, and as the fine was levied by fraud and covin, the owner of the fee, viz. R. F. should not be bound by the five years non-claim.

Though a feoffment by tenant for years, &c. will create a freehold by disseisin, which estate of freehold will support a fine, yet it has been lately determined, that a feoffment by a tenant in tail *in remainder* will not create *such* an estate of freehold, as can support a *common recovery*. Thus, in a case°, where A. was tenant for life, with remainder to his first and other sons, reversion to himself in fee, with a power of appointing a jointure to any after-taken wife; A. married J. S. and pursuant to his power limited the lands to the said J. S. for her life, as a jointure. A. by his will devised the reversion, expectant upon the estate tail, to J. D. and then died, leaving B. his eldest son. B. entered on all the estate by virtue of the limitation to the first and other sons, excepting that part which was limited to J. S. for life by way of jointure. J. S. being in possession, an ejectment was brought against her on the several demises of B. and J. W. for recovery of the premises, which she held by virtue of the limitation

• Taylors
dem. Atkyns
v. Horde.
1 Burr. 60.
Cowp. 68y.

tation under the power given to A. when a verdict was given for the plaintiff, on which judgment was entered, and a writ of *habere facias possessionem* executed. B. being thus in possession under the verdict, made a feoffment with livery of seisin to D. in order to make a tenant to the *præcipe* for the purpose of suffering a recovery to the use of E. his heirs and assigns for ever; which recovery was suffered accordingly. After the death of B. without issue, J. S. the jointress brought her ejectment against the heir at law of B. for the recovery of her jointure. A verdict was given for the plaintiff, and judgment entered thereon, and J. S. restored to the premises. The question was, whether the recovery was properly suffered; that is to say, whether there was a good tenant to the *præcipe*? Lord Mansfield, in delivering the resolution of the court, held, that the recovery was *not* duly suffered: that the taking possession by B. under the judgment in the ejectment, did not of itself create a disseisin of the freehold. The possession acquired thereby was only a *naked* one. That the feoffment by B. when in possession under the judgment in the ejectment, did not create an *actual* estate of freehold by disseisin, but an estate of freehold merely at the *election* of the person supposed to be disseised. The judges in this case seemed anxious to distinguish the disseisin created by the feoffment from an *actual* disseisin in order to avoid the recovery; which indeed, if established, would overturn a rule of law, viz. that a tenant in
tail

tail in *remainder* cannot suffer a recovery without the concurrence of the tenant *for life*. Therefore, to make use of the emphatic expression of Lord Mansfield, "If this question had been agitated in an *adversary* real action, upon a plea that D. was not tenant to the freehold, it would have been adjudged, from the law and artificial learning of tenures, that he could *not* be so considered. If the question had been, whether tenant in tail in remainder should by such injurious entry and feoffment acquire a benefit to himself, to the prejudice of the reversioner; it would have been adjudged, from eternal principles of justice, that an act founded on wrong should *not*, by virtue of the *crime itself*, become legal for the author's advantage. And now," added his Lordship, "it is agitated, when common recoveries are established as a *species of alienation*: and the question is, whether the rule of law, which requires the concurrence of the owner of the first estate for life, shall be overturned?" To which it is answered, "'Tis better to subvert the rule *directly*, than suffer it to be done by a *secret injurious* entry, and feoffment." Upon this ground alone I apprehend, without recurring to the refined distinctions between *actual* disseisins, and disseisins merely at the *election* of the parties, the recovery might have been set aside, according to the principles laid down in Fermor's case.

It appears to me, that the original notion of a disseisin *at election* arose from the circumstance

circumstance of a man's *supposing* himself to be disseised, when in *fact* he was *not*, for the sake of entitling himself to the easy and commodious remedy of assise of *novel disseisin* (which was the common method of trying titles, till the ejectment came in use ^p) instead of being driven to the more tedious remedy of a writ of entry ^q. The remedy by assise of *novel disseisin* was introduced to redress *actual* disseisins recently committed: the facility of this remedy induced others, who were wrongfully kept out of the freehold (though not by an actual disseisor) to allow or suppose themselves to be disseised, merely on account of the remedy. So that in truth the original act, committed by the wrong-doer, was not in itself a *disseisin*, unless the party, supposed to be injured, *elected* it to be so. I shall here

[†] Butl. Note i.
Co. Litt. 330. b.
under fol. 337.
g.

quote the words of Mr. Butler^r, in his very learned note upon this subject, which explain the distinction alluded to in a very clear manner. "By a disseisin," says he, "at the election of the party is not to be understood an act, which in itself is a disseisin, but which the party, supposed to be disseised, may, if he pleases, consider as *not* amounting to a disseisin: on the contrary, every act which is susceptible of being made a disseisin by election, is *no* disseisin, *till* the party in question by his election makes it such."

* W. Jones, 315,
316. vide the
cases cited
1 Burr. 111,
112, 113.

As an instance of this kind of disseisin at election, in the case of *Blundel v. Baugh*^s, the judges held, that if a tenant at will makes a lease for years rendering rent, and he enters, and pays rent, that can be no disseisin,

feisin, unless at the election of the first lessor. In this case the original act by the tenant at will, viz. the making the lease for years, was not of itself sufficient to create a disseisin; but if the first lessor had feigned himself to be disseised for the sake of the remedy, then it would have become a disseisin upon the election of the first lessor. It follows from this idea of a disseisin at the election of the party, that every act, which *immediately* of itself creates a disseisin, must be considered as an *actual* disseisin. Now the feoffment of a tenant for years, at will, &c. had the peculiar force of creating an *immediate* estate of freehold in the feoffee, with all the rights and incidents annexed to it; the estate of the feoffee became *immediately* subject to dower and curtesy, and the descent upon the heir *immediately* took away the entry of the disseisee¹. That a feoffment by tenant for years, &c. *had*, and indeed *has* to this day, the force of creating an *actual* estate of a freehold by disseisin, is a point, I think, pretty clearly settled by the authorities before recited. Indeed, the judges, in delivering their opinions^v in the above case of *Atkins v. Horde*, said, that where the books speak of an actual disseisin created by the feoffment of a tenant for years, &c. it must be understood of feoffments of *old*, attended with livery, and an *actual* transmutation of the possession; but that conveyances had now languished into a *mere form*, and had lost their *efficacy* and *solemnity*. According to this opinion of the judges, we are led to believe,

¹ Butl. note:
Co. Litt. 330. b.
under fol. 337.

^v Cowp. 7032

lieve, that they thought a feoffment by a tenant for years, &c. would not *at this day* transfer an *actual* estate of freehold by disseisin to the feoffee. But Mr. Butler, in the excellent note, so frequently referred to, has endeavoured to prove (and I think successfully) that feoffments from the time of Henry the second (which is prior in point of time to the instances given by the judges as cases of *old* feoffments) to the present period, have not been made with any other solemnities, than those with which they are made at present; and of course the operation and *efficacy* universally allowed them by courts of judicature, and writs of authority, from that monarch's reign, must be ascribed to them *now*. Mr. Butler concludes his dissertation on this subject by observing, that from the authority of Bracton and others, the disseisin produced by *feoffments* must be understood to be an *actual* disseisin, and not a disseisin merely at the *election* of the party. That however slender, bare, or tortious, the possession of the feoffor is, his feoffment necessarily and unavoidably vests the freehold in the feoffee, till the disseisee by entry or action restores his possession. And that a fine may be levied of, or common recovery suffered upon, this estate of freehold by disseisin; which feoffment, fine, and recovery, will in process of time bar the owner of the freehold and inheritance.

There is a case, that must occasionally come before professional gentlemen, which is principally founded on the learning of disseisins:—

seisms:—Suppose A. to be possessed of a term of 1000 years, under a decree of fore-closure, made perhaps 50 or 100 years ago: and on account of the great length of time since the term was first created, it is impossible to ascertain the owners of the reversion in fee: In this case, if A. the termor is desirous of obtaining the freehold and inheritance, and for the reasons just given he cannot legally purchase the reversion, he may by a feoffment and fine absolutely acquire the fee: and as the reversioner is here unknown, and as there is no paying of rent, or the like, which would, according to Fennor's case, admit the possession of the reversioner, ^{2 Vesey, 61.} there can be nothing to obstruct the full force and operation of the feoffment and fine.

In a case of this kind, it seems advisable that the term should be previously assigned to an indifferent person; that there should then be a feoffment with livery of seisin; after that, a fine should be levied; and then, by a third deed, reciting the assignment, feoffment, and fine, the *uses* of the feoffment and fine should be declared, and it should be also declared, that the term was assigned to attend the inheritance, not generally, but as acquired by the feoffment and fine.

The term may in this case be assigned absolutely without any trusts declared in the deed of assignment, leaving it to the subsequent deed to direct them; or it may be assigned in trust for such person or

persons as the assignor shall appoint, and in default of such appointment in trust for the assignor. Either case will effectually serve the purposes of the assignment. If no trusts are declared in the deed of assignment (as the state of frauds prevents any resulting trust) when the assignor makes the feoffment, he does not make it as being in possession under the term (for *that* he has absolutely transferred to another) but as having an actual possession, without having apparently any *legal* or *equitable* title to the lands. For after the assignment he has certainly *no right to the possession*, but must be considered as a *wrongful withholder* *. In this case then it is very clear, that the feoffment, which acquires the tortious freehold, does not forfeit the term vested in the assignee: consequently, if the estate of freehold, as acquired by the feoffment, should be avoided by the entry of the reversioner, still the term will remain unforfeited. So if the assignor made the feoffment, as being *cestuique trust* of the term, still the feoffment could work no forfeiture of the *legal* estate of the trustee, as I have endeavoured to explain elsewhere †.

* Vide: Barr.
95, 96.

† Supra, 42 to
63.

It would be unnecessary to dwell upon the utility of the assignment of the term, in preventing a forfeiture of it by the feoffment. It is, however, farther observable, that if the feoffor had not previously made an assignment, the feoffment would have extinguished the term. For in such a case, the term would have passed by the

the feoffment and livery from the *termor*; and yet it would not have been transferred to the *feoffee*, for the *fee* passed to him: neither could the first lessor or reversioner have it ^a.

^a Jenk. Cent.
267.

Lord Hardwick ^a laid it down as a rule, "that a fine levied by a *termor* for years is a forfeiture; but the reversioner has five years after the expiration of the term to enter." The case of *Whaley v. Tankard* ^b

^a 1 Atk. 571.

^b *Supra*.

agrees with this opinion: for both speak of the forfeiture incurred by the *lessee* himself. But Lord Coke, in *Margaret Podger's case* ^c, seems to make a distinction, where the *lessee* for years, and the *lessor* are *both* disseised, and a fine is levied upon such newly-acquired estate by disseisin; for in this case, he says, that after five years run upon the fine from the time it was levied, the lessee and lessor are both barred by the non-claim. Now if this distinction of Lord Coke be true, then whether the feoffer in the principal case makes his feoffment as *cestuique trust* of the term (in which case he would be tenant *at will* to the trustee) or whether he makes it as a *wrongful withholder* or *disseisor*, after an absolute assignment of the term, in either case he not only disseises the reversioner, but also the estate of the trustee ^d or termor: and then if a fine is levied upon this estate of

^c 9 Co. 105. b.

^d *Vide* *Vancey*,

481.

has

* Vide 2 Vent.
334.

has been denied to be law upon the *authority* of the case of *Whaley v. Tankard*^e. Though indeed there appears to me to be a material distinction between the two cases. This distinction was recognized by the court in the same case of *Whaley v. Tankard*, who said, that in that case the lessee came in with *privity*, and was *trusted* with the *possession*: but that in the case cited by Lord Coke, the disseisin was committed *without the consent* of the lessee. Even supposing the term had not been previously assigned, and the feoffor, as termor for years, had made the feoffment, yet there does not seem to be such a *privity* between the termor and reversioner in this case, as to bring it within the *reasons* of Fermor's case, or that of *Whaley v. Tankard*. In this case the termor comes in by a *decree of the court*, and is not *entrusted* with the possession. Whilst indeed the equity of redemption continued, there subsisted a *privity* between them as *mortgagor* and *mortgagee*; but the decree of *foreclosure* entirely destroyed *that privity*. I shall conclude by citing the opinion of Lord Hardwicke^f, who said, if a man purchases an estate, which he sees himself has a defect upon the face of the deeds, a *fine* levied will be a bar; for the *defect* upon the face of the deeds is often the *occasion* of the *fine's* being levied.

2 Atk. 631.

It may not be unacceptable to subjoin the form of an antient deed of feoffment in English, with a declaration of the *use* to the feoffee,

Know

Know all men by these presents, That I William Hartwell, of ———, in the county of Middlesex, gentleman, for and in consideration of a certain sum of money, have granted and enfeoffed, and by these presents do confirm unto John Hannay, of ———, in the county of Middlesex, aforesaid, gentleman, and to his heirs and assigns, all those messuages, lands, tenements, and hereditaments, situate and being [*the parcels, &c. should be here inserted, and described*] with all and every of the appurtenances thereto belonging, or in any wise appertaining, to have and to hold the said messuages, lands, tenements, hereditaments, and premisses, with their and every of their appurtenances, unto the said John Hannay, his heirs and assigns, to the only use and behoof of the said John Hannay, his heirs and assigns for ever. And I the said William Hartwell, my heirs and assigns, will warrant, and for ever defend the aforesaid messuages, lands, tenements, hereditaments, and premisses, hereby conveyed, or intended so to be, with the appurtenances, unto the said John Hannay, his heirs and assigns, against all and every person or persons whomsoever. In witness whereof, I have hereunto set my hand and seal, this ——— day of ———, in the year of our Lord ———.

Signed, sealed, and
delivered, in the
presence of

Livery

Livery of Seisin indorsed.

Mem.—On the day and year above-mentioned, he, the said William Hartley, [or A. B. of ———, gentleman, by virtue of the power and authority to him given by the within-named William Hartwell] did enter into and upon the premisses within mentioned to be conveyed, and take and deliver quiet and peaceable possession, and livery and seisin thereof to John Hannay [or to D. E. authorized and appointed by him to take and receive the same] according to the force and effect of the within-written deed, in the presence of us,

G R A N T S.

G R A N T S.

NOTHING could be more simple, and at the same time better adapted to transfer the possession of lands, than the antient conveyance by feoffment and livery. But the nature of the feudal system soon obliged men to contrive other modes of assurance for the purpose of conveying such species of property, as could not be aliened by livery of seisin, or the mere delivery of possession. Thus, according to the feudal doctrines, the lord, upon giving lands to a feudatory, still reserved to himself services either expressed or implied : from which circumstance the lord was said to be seised of a seigniory, whilst the feudatory or tenant had the feud, or the possession held by feudal services^a. This possession or feud, the feudatory might by permission of the lord transfer by public investiture, or livery of seisin; and so the lord on the other hand might with the permission of the tenant convey his seigniory. But then this seigniory could not be transferred by livery of seisin, because it was a thing whereof no possession could be had,
So

^aWright's Ten.
30, 31.

So too after the feudal law permitted alienations in fee, for life, or years, the tenant or feudatory thought it advantageous to carve lesser or particular estates out of the seisin of his original feud, whereby he reserved to himself the *reversion*; or perhaps in parting with the whole of his feud, he in return secured to himself a rent charge; or in making leases, he reserved an annual rent, &c. In these cases, as in that of the feignory, neither the rent nor reversion could be granted by livery of seisin, for of these things no possession could be taken. Now in order to convey this species of property, and to supply the notoriety of livery of seisin, it was thought that the delivery of the deed, which contained the intention of the parties (the one of parting with, and the other of receiving the property) was the best, and only method to effectuate that purpose. Upon this account all such kind of property, whereof no actual possession could be taken, was said to lie *in grant*; such as feignories, rents, services, reversions, commons in gross, tithes, &c. which, in contradistinction to *corporeal* hereditaments, were called *incorporeal* hereditaments, because they wanted the substantial and permanent quality of land, houses, wood, &c.

The conveyances by feoffment and grant, were the two original and principal conveyances at the common law for conveying the two species of property above alluded to. A grant may properly be defined to be, a gift in writing of such things as cannot pass by livery of seisin. Before the statute 29 Car. 2. it was said to be a gift of such things
as

as could not pass by *word* only without any writing, as rents, reversions, &c. Taking it, however, in this sense, all conveyances by the king, and bodies politick, were properly *grants*; for they could not convey but by a *deed*^b. So also the term *grant* may in its common acceptation be applied to a feoffment, fine, recovery, bargain and sale, lease and release, &c. But *grant* in its true meaning must be understood of a conveyance of incorporeal hereditaments. In this sense alone I shall consider it in the ensuing pages.

^b West. Symb.
pl. 1. c. 290.

The mode, which I shall adopt in treating this subject will be to consider, 1st. What things, which do not lie in livery, are allowed by the law to be granted, or transferred from one man to another. 2^{dly}. What are the peculiar properties of such things as lie in grant. 3^{dly}. By what operative words they will pass. And, lastly, the manner in which reversions, and rents, &c. are granted.

If a man has common in gross of pasture *sans number* granted to him *in fee* by deed, it is said, that the grantee may grant, or transfer it to another, because the word *heirs* implies *assigns*^c. But even now a common in gross *sans number* for *life* or *years*, cannot be granted over, unless the grant had been to the first grantee, and his *assigns*^d. However, Rolle makes a quere as to this case^e. Common of pasture for a *certain* number of cattle is transferable without the word *assigns* added in the first grant^f. The difference then in these cases is between common

^c 2 Roll.ab.46.

^d Perk. c. 103.
^e 2 Roll.ab.46.

^f Perk. c. 103.

of

of pasture *with*, and *without* number. It is held, that the grantee of a common may grant it, before he has had seisin thereof, because by the grant he is seised of the free-

^a 2 Roll. ab. 47. hold.

The conveyance by which common of pasture in gross may be granted, is a grant at common law ^b; or common of pasture may be extinguished by a release to the tenant of the land ⁱ. It was said by Crew, C. J. that common for beasts might be limited to uses ^k; whereas Dodderidge ^l was of opinion in the same case, that commons could not be granted to a use, *quia ipso usu consumuntur*; if this latter opinion be law, then common in gross cannot be passed by a bargain and sale, or covenant to stand seised. However, it seems, without doubt, that common when conveyed with lands, may pass with the lands by either of those conveyances ^l, and indeed lands cannot pass without the common, which is appendant to it ^m. So a common in gross *certain* may be granted by a fine ⁿ, though not by a common recovery ^o.

^a Litt. f. 617.
West. Symb.
pl. 1. f. 294.
ⁱ Shep. T. 319.

^k W. Jones,
118.
^l Ibid. 127.
Sup. Vide
Bro ab. tit.
seoff al. uses,
pl. 10.

^l Vide West.
Symb. pl. 1.
f. 396.

^m Perk. f. 104.

ⁿ 1 Cruise, 121.

^o 2 Cruise, 168.

Fig. Rec. 96.

^p 2 Roll. ab. 45.

^q Shep. T. 237.

^r 2 Roll. ab. 45.

^s Perk. f. 91.

^t Perk. f. 65.

A corody *certain* (secus as to a corody *uncertain* ^p) and rents, or services, are grantable over in fee, for life, or years ^q. A rent may be granted before the grantor is seised of it; as if a lease be made to begin at Easter, and before that time the lessee grant his term to a stranger, this grant is good ^r. But if a man grants a rent out of the manor of Dale, when he has no property therein, and afterwards he purchases the manor, yet still the grant of the rent, as it was void in the beginning, shall never take effect ^s. But though a man cannot

cannot by a *present* grant charge those lands which he has not at the time of the grant, yet if a man grants the reversion of an acre of land, when he has nothing in the land, by a fine *executory*, and afterwards the reversion is purchased by him, the grantee may in this case enter when the reversion falls, or have execution thereof by a *scire facias*^t. So a grant of a rent charge to be issuing out of a reversion expectant on a particular estate is good to charge the lands after the death of the tenant^v. But no rent can be reserved upon the grant of *incorporeal* hereditaments, nor out of a *right*, as if a disseisor release to a disseisor, reserving a rent, the reservation is void^w.

Rents may be reserved on, or created by, a fine executed^x, bargain and sale^y, common recovery^z (not only out of the possession of the recoverer, but of *cestuique use*) lease and release, or covenant to stand seised^a.

Vested remainders may be granted^b. But by the common law, if there had been a devise of a *term* to A. for life, remainder to B.; here B. could not in the life-time of A. grant his remainder; because, as A. might outlive the term, it was an uncertain event, whether B. might ever come in possession under the term, which uncertainty, or possibility was not grantable over^c. So if a lease had been made to two for their lives, the remainder to the executors of the survivor, now as this chance of survivorship was extremely uncertain, it could not have been granted or transferred^d. But it has of late been held, that if a term is devised to A. for life, remainder

^t Ibid. 56.

^v Ibid. 92.

^w Co. Litt. 244.

^d.

^x 2 Roll. ab. 18.

^y Co. Litt. 144.

^a.

^z 2 Co. 69. b.

72. b.

Vaugh. 52.

^b 2 Vent. 260.

266.

^c 2 Comm. 290.

^e 10 Co. 47. a. b.

Vide Shep. T.

238. as to the

grant of a possi-

bility coupled

with an interest.

^d Co. Litt. 46. b.

mainder to B. for the residue thereof, such possibility may be assigned^c: and if it were not in strictness to operate as an *assignment*, yet it would be good as an *agreement*, especially when made for a valuable consideration. ^{18d.} So where there were two co-heiresses to J. S. and being in expectation of gaining considerably by him, they agreed in the life-time of J. S. to divide between them whatever should come to them by virtue of his will; now though this agreement was concerning so remote a possibility, yet it was established by ^{2 P. W. 182.} a decree of the court of Chancery^f. It is also held, according to the present course of chancery, that not only a trust, but even the possibility of a trust, is grantable ^{3 Vide supra, 69.} over^g.

The books make a distinction between a *possibility*, and an *interest*. If a lease is made, it is not perfected till entry by the lessee; yet even before the entry the lessee has an *interest* in the term, which he may transfer^h. But where ^{1 Moor, 27.} A. made a lease of forty years to B. ^{2 Methen's Case.} and it was covenanted that if the lessor found the premises well and sufficiently repaired at the expiration of the term, then the lessee should hold over during forty years longer; the lessee granted *totum interesse terminum, et terminos quæ tunc habuit in tenementis illis*, and it was held that this assignment did not pass the term expectant on the first term, for that was but a *possibility*, and no interest. So there has been a distinction taken between such possibilities, as we have just mentioned, and those which are a kind of *incidental* or *natural produce*, arising out of lands let upon lease:

lease: for these latter possibilities are said to be grantable over. Thus if a lessor covenants and grants, that the lessee for years after the expiration of the lease may carry away the corn growing upon the premises, now though it be a possibility, whether any corn may be growing at the end of the lease, yet as the lessor is owner of the soil, out of which the corn must arise, he has a power to grant it to the lessee^k. So if A. leases land to B. for years, and grants that he shall have the natural and yearly fruit of the soil, which shall be on the land at the expiration of the term, such as grafs, &c. this grant is valid, and passes the property to the grantee^l. The grant of all the tithe wool of such a year, is good in its creation, though it may happen there was no tithe wool in that year. But the grant of the wool, which shall grow upon such sheep, as the grantor shall afterwards purchase, is void.

^k 2 Roll.ab.47.

^l Hob. 132.

^l 2 Roll.ab.48.

Hob. 132.

^{ibid}.

A *contingent remainder* may be granted or passed before it vests, so as to bind the interest, which may afterwards accrue by the contingency: but this cannot be effected by any other conveyance than a fine by way of *estoppel*, or possibly by a common recovery^m. Thusⁿ, where A. made a feoffment to the use of himself for life, and after the death of himself, and M. his wife, to the use of B. his eldest son for life, and after the death of A. M. and B. to the use of B. and his heirs male of the body, and for default of such issue to the use of the heirs of B; B. had issue a daughter, and by fine, and indenture granted to D. for 500 years, to commence after the

^m Fearn, 537.

edit. 4.

ⁿ Pollex. 54, 55.

Weale and

Lower.

Fearn, 535.

the death of A.: B. and M. died, and A. survived; it was held that the estate limited to B. was a contingent remainder; and though B. levied the fine for 500 years, and died before the contingency happened, yet his heir afterwards, when the contingency happened, was bound by the fine during the 500 years, and that if the fine had been in fee, the heir would have been bound for ever.

* 3 P. W. 372.
Supra 285.

In the case of *Vick v. Edwards*^o, which we have before stated, Lord Talbot held that a fine would bar the contingent remainder to the survivor, and pass a good title to a purchaser. It is observed by Mr. Fearn^e with respect to this case, that Lord Talbot did not seem to advert to the circumstance of the fine's being levied by the person, who had the particular estate for life, as well as the contingent remainder; and consequently *destroying* that contingent remainder, instead of merely passing it by estoppel.

* Fearn^e, 536:
edit. 4.

There are different modes of passing *vested* remainders. If an estate is limited to A. for life, remainder to B. for life, or in fee, B. may transfer this remainder to another by a grant at common law (though to such grant attornment was formerly necessary⁹) or by a bargain and sale^r, or lease and release^s, or covenant to stand seised^t, or by a release to the particular tenant^v. But if there be an estate for life, remainder to J. S. *in tail*, J. S. cannot by any of the conveyances just mentioned pass his estate tail in remainder, so as to exclude the claims of his issue, for they can only transfer, what the grantor lawfully

* Litt. f. 569.
578.
^r Vaugh. 51.
^s Buil. note 3.
Co. Litt. 270. a.
^t 2 Co. 15. a. b.
Vide supra.
^v Litt. f. 465.

ly

ly may grant, viz. a base fee, determinable by the entry of the issue in tail^u. How^u Vide 2 Salk. 619.
 ever, if in this case J. S. levies a *fine*, it will completely bar the claims of the issue in tail^w. So if there be tenant in tail in possession, the issue in tail may, during the life of the tenant in tail, bar the entail by levying a fine^x.^w 3 Co. 84. a.
^x 3 Co. 51. a.

But though a fine levied by a tenant in tail in remainder bars the entail, yet a common recovery has not this power; for if there be a tenant for life, remainder to J. S. in tail, if J. S. wishes to suffer a recovery to bar the estate tail in remainder, he must previously procure a surrender of the life estate to the person against whom the writ of entry is to be brought^y.

Reversions are also a species of incorporeal hereditaments, and may be passed by a grant at common law^z. *Reversions* differ very materially from *remainders* in this respect, viz. that the former are deemed to be a present actually *vested* interest, which may be granted so as to take effect during the lives of the particular tenants; whereas, with respect to the latter, if A. be tenant in tail, remainder over to B. in tail, and B. bargains and sells to D. during the life of A. this grant is absolutely void, because it can never take effect in possession^a.^y 2 Cruise, 309.
^z 1 Geo. 2. c. 29. f. 2.
^a Litt. f. 568.

Reversions may also be granted or transferred by a bargain and sale^b, lease and release^c, covenant to stand seised^d, by a fine^e, or release to the particular tenant^f. How^g Vide 2 Salk. 619.
 ever, a common recovery suffered by a reversioner will not pass the reversion, because^h 2 Co. 51. a.
^b Vaugh. 51.
^c Butl. note 3.
^d Co. Litt. 270. a.
^e 5 Co. 81. b.
^f 11 Co. 26. b.
^g 47. a.
^h 5 Co. 39. b.
ⁱ Litt. f. 575.

cause in order to suffer a recovery, it is absolutely necessary that the tenant to the *præcipe* should have an actual estate of freehold ^g.

^g Vide *2 Cruise*, hold ^g,
23, 18, 14.

Advowsons are likewise a kind of property, which lie *in grant*, and are transferrable from one person to another^h. Indeed it is said, that the grantee of an advowson may grant it before any presentmentⁱ. As an advowson in gross may be limited to uses^k, it seems, that it may be transferred by a bargain and sale, lease and release, and covenant to stand seised. So a fine may be levied of an advowson in gross^l. In *Dormer's case*^m, it was assigned for error, that a writ of entry in the *post* did not lie of an advowson; it was, however, resolved, that a recovery might be suffered of an advowson. But it has been saidⁿ, that this must be understood of an advowson *appendant* to a manor, and not of an advowson *in gross*; however, it is agreed, that a recovery may be suffered of an advowson, together with a very small quantity of land^o.

^o 2 Willf. 116.

Seignories, tithes, and franchises, such as views of frankpledge, perquisites of courts, leets; to have a lordship paramount; to have waifs, wrecks, estrays, treasure trove, royal fish, forfeitures, and deodands; to have the conusance of pleas; to have a bailiwick, or liberty exempt from the sheriff; to have a fair or market; or to have a forest, chase, park, warren, or fishery, and the like, are grantable over from one man to another in fee, for life or years^p.

^p Shep T. 239.
Vide the cases
referred to in
note 1.

It was formerly doubted, whether an annuity was assignable, even if the word *assigns* was inserted in the grant; however, it is now settled, that it is transferrable even *without* the word *assigns* ¹. Still in the special case ^a Har. Co. Litt. of a grant of an annuity *pro consilio impendendo*, ^{note 1. 144. b.} if the word *assigns* is omitted, it is not transferrable ^r. An annuity of inheritance is for- ^r Perk. f. 101. feitable for treason, like corporeal heredita- ^r Co. 28. b. ments; yet it does not come within the statutes of mortmain, nor is it entailable with the statute *de donis* ^s.

A man may give or grant his title deeds to another, who may either keep or cancel them; and so a man may give away his title deeds of his estate in fee simple, and his heir can have no remedy ^v. But a tenant in ^v Shep. T. 240. tail cannot give away the title deeds belong- ^{241.} Co. Litt. 232. b. ing to the estate tail no more than the lands themselves ^w. So if a man mortgages his ^w Shep. T. 241. lands, and does not deliver up the title deeds, and afterwards makes a second mortgage to a man without notice, and delivers up the title deeds to the second mortgagee, upon a bill of foreclosure brought by the first mortgagee, and to have the title deeds delivered up to him, the court will not compel the second mortgagee to deliver up the title deeds, unless the first mortgagee pays him his mortgage money. This was the point in the case of Head v. Egerton ^x.

^x 3 P. W. 280.

Having pointed out such things as lie in grant, which are grantable over, and also the different conveyances by which they pass, it remains to shew such particular kind of property as lie in grant, which at the same

time is *not* allowed to be transferred. It is a pretty general rule, that all things which are granted to a man by reason of any *trust* touching the person of the grantor, cannot be granted over, unless the grant is made to the grantee, and his *assigns* ¹. Nor can an office of trust respecting the grantor be exercised by deputy, unless the grant provides for that circumstance ², or unless it is limited to the *heirs* of the grantee ³. The office of carver, or sewer, or chamberlain, &c. cannot be granted over, or used by deputy, if the grant is not made expressly for that purpose ⁴. Though the sheriff's office be not grantable over, yet it may be exercised by deputy ⁵. It has been held, that where one office is incident to another, such incidental office cannot be separated from the principal. Therefore, when the king granted the office of *shire-clerk* of a county, the grant was held void, the office of *shire-clerk* being inseparably incident to that of *sheriff* ⁶. So the grant of the office of *marshal*, with a reservation of the office of *chamberlain*, is void ⁷.

Choses in action, or rights of going to law, are not (strictly speaking) assignable, or transferrable ⁸. Thus a bond is a chose in action, and by the rules of the common law is not grantable over: and though we daily see assignments of bonds, yet these assignments are rather in the nature of letters of attorney authorizing the assignee to sue in the assignor's name; or (to use the words of Sir W. Blackstone ⁹) "when in common acceptance a debt or bond is said to be assigned over, it must still be sued in the original creditor's name;

¹ Perk. f. 99.
cite 19 H. 8. 10.
11 E. 4. 1.

² Perk. f. 100.
³ Shcp. T. 240.

⁴ Perk. f. 101.

⁵ Shcp. T. 237.
238.

⁶ 4 Co. 32. b.

⁷ 2 Salk. 439.

⁸ Co. Lit. 213. a.

⁹ 2 Comm. 442.

" name; the person to whom it is assigned
 " being rather an attorney than an assignee.
 " But the king is an exception to this gene-
 " ral rule, for he might always grant or re-
 " ceive a chose in action." And though a
 bond or obligation cannot be granted or as-
 signed over, yet the obligee may grant the
 deed itself to another, who may either cancel
 it, or deliver it up to the obligor^c. The ^b Co. Litt. 232.
 reason given, why these choses in action can-
 not be assigned over, is because it was thought
 to be a great encouragement to litigiousness
 to permit a man to make over to another his
 right of going to law^f. But notwithstanding ^f 2 Comm. 442.
 this rule of law, yet equity has in many cases
 supported assignments, and grants of choses
 in action. For though in the case of Burnet
 v. Kynaston^g, where a man married a woman ^g 2 Vern. 401,
 entitled to a mortgage in fee, and afterwards
 assigned his interest in the mortgage to trust-
 ees to call in the money, and to lay it out in
 lands to be settled upon him and his wife, and
 their issue: after this assignment the husband
 died, and then the wife died; it was decreed,
 that this mortgage of the wife was but a chose
 in action, and not assignable till reduced in
 possession by the husband: yet the grounds of
 that case seem to be from the want of a con-
 sideration paid to the husband, sufficient to
 change the property in action of the wife.
 For in a subsequent case^h it was held, that a ^h 3 P. W. 199,
 man entitled to a chose in action in right of ^{200.}
 his wife, as he might release, or forfeit it, so ^{Lord Carteret}
 might he assign it for a *valuable consideration*; ^{v. Paschall.}
 and that a man, entitled to a chose in action in
 his *own* right, might assign it *without* a valu-
 able

able consideration. Indeed in this last case it was held; that if a feme sole has a *decree* to hold and enjoy lands until a certain debt be paid to her, and she is in possession of the lands under the decree, and marries, her husband may assign it without any consideration. So it is also of a judgment extended upon an *elegit*.

* 2 Vern. 595. So in *Crouch v. Martin*ⁱ, it was held, and decreed, that a seaman's wages, which are a chose in action (being due by contract, although the service be not done) were assignable for a valuable consideration in equity; and in such case the assignee alone becomes entitled to receive them. So, payment to the obligee of a bond by the obligor, when he has notice of a previous assignment, is void^k: though it is otherwise if he has *not* notice of the assignment^l. As equity therefore has established the grants, and assignments of *choses in action*, the same rules with regard to notice seem to apply to the grantees and assignees of *choses in action* as relate to purchasers and mortgagees of landed property. Thus, where a man possessed of a chose in action, for a *valuable consideration* assigned part of it to J. S. and afterwards for a valuable consideration assigned over not only the remaining part, but also the part already granted, to A. B., who had no notice of the former assignment; it was held that the first assignment should take place in preference to the second^m.

As a *chose in action* cannot at law be granted or assigned, so neither can a *right of entry* for similar reasonsⁿ. Therefore, if a disseisor of

ⁱ 3 P. W. 307.

^k Co. Litt. 214.

^l .

of land grants his right to a *stranger*, the grant is void; though a release to the *disseisor* himself had been good.^o * Perk. c. 86.

The *suspension* of things, which lie in grant, do not generally extinguish the power of granting them. Therefore, if there be a lord and tenant, and the tenant *leases* his tenancy to the lord for *life*, still the lord may grant his seignory to a stranger, though at the time it was in suspense. But it is said that if a grantee of a *rent charge* purchases parcel of the land, out of which the rent charge is issuing, it shall be extinguished for the whole, though *secus* as to a rent service *p.* Perkins p. Litt. c. 222.
vide on this
head Co. Litt.
147. b. 148. a. b.
149. a. b. says, that if there be lord and tenant, and the tenant *enfeoff* (by which word we may suppose the *fee* to have passed) the lord of the tenancy upon *condition*; the lord may still grant his seignory; for if the condition be broken, and the tenant enter, the seignory is revived *q.* * Perk. c. 89.

In the preceding observations on *grants*, I have frequently hinted at the necessity in most cases at the common law of *attornment* to complete those grants. With respect to attornments we are to observe, that they owed their origin to the feudal system. As the feudatory could not by the feudal law alien the feud without the consent of the lord, so neither could the lord alien his seignory, without the consent of the tenant^r. From Wright's Ten.
171. this circumstance arose the doctrine of attornment, which was nothing more than an indication of the consent of the tenant upon the alienation of the seignory, or fealty and services by the lord. Upon the reasons of attornments,

* Bract. lib. 2.
cap. 35. f. 13.
Co. Litt. 309.a.

tornments, we find this passage in Bracton :
" Videndum si dominus attornare possit
" alicui homagium, et servitium tenentis sui
" contra voluntatem ipsius tenentis; et vi-
" detur quod non : et maxime homagium;
" quia tale sequeretur inconveniens, quod
" possit eum subjugare capitali inimico suo,
" et per quod teneretur sacramentum fide-
" litatis facere ei, qui eum damnificare inten-
" deret. Est et alia causa, quare homagium,
" et servitium attornare non possit, ut si velit
" homagium attornare tale, qui nihil habeat
" in bonis, unde possit warrantizare, defen-
" dere, et excambium facere." Attornments

were not only necessary upon grants of feignories, but upon grants of rents, remainders, and reversions expectant upon estates for life, years, or in tail. But the doctrine of attornments was in a great measure avoided by the introduction of conveyances *to uses* : and indeed by the statute 4 Ann. c. 16. f. 9. it is rendered useless. This statute enacts, that all grants or conveyances, by fine, or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good without attornment of the particular tenants; provided that no such tenant be damaged by payment of rent to any such lessor or grantor, or by breach of any condition for non-payment of rent, before notice given him of such grant by the lessee or grantee. The statute 11 Geo. 2. c. 19. f. 11. also enacts, that all attornments of tenants to strangers, of any hereditaments within England, Wales, or Berwick, shall be void, and the possession of their lessors shall not

* Wright's Ten.
172.

not be affected by any such attornments; provided that that statute should not affect any attornments made pursuant to some judgment at law, or decree or order of a court of equity, or made with the consent of the lessor, or to any mortgagee after the mortgage is forfeited.

Secondly, *What are the peculiar properties of such things as lie in grant?*

I believe it to be a pretty general rule, that things which lie in grant, and do not pass by livery, cannot be discontinued by any conveyance, whether by fine or otherwise. ^{v. Litt. f. 616, 617, 618.} The reason of this is, because a grant of this kind of property passes only what the grantor lawfully may pass. Thus, if a tenant for life or years, of an advowson, rent, common, &c. grants *in fee*, this grant only passes his estate for life, or years, and is no forfeiture. ^{v. Co. Litt. 232. a. 251. b.} Another reason for this seems to be, because the term *discontinuance* was introduced to distinguish the power, which it afforded the *discontinuee* to restore his right by *action*, from the power which a *disseisin* gave the disseisee of restoring his possession by *entry* only. Now though these two terms, *disseisin* and *discontinuance*, were applicable to landed property, yet as the owner of things, which lie *in grant*, could never have any remedy by *entry*, but solely by *action*, the distinction could never be applied to him.^x

It is however observable, that Littleton produces several examples of disseisins of a *rentsecke*; and indeed the very remedy, which was allowed for the recovery of rent, viz. by an assize of *novel disseisin*, shews us that

^x Vide Butl. note 1. Co. Litt. 332. a.

^v Litt. f. 233. 235, 236. 239.

that, the word *disseisin* was not improperly applied to rents. He also tells us, that there may be a disseisin of a *rent-service*, and *rent-charge*². It seems that, a *disseisin* or *discontinuance* of *corporeal* hereditaments necessarily operates as a disseisin or discontinuance of such *incorporeal* rights as are incident and appurtenant to the land affected by such discontinuance or disseisin³.

So there can be no *general occupancy* of any thing, which lies in grant^b: for as the law requires the solemnity of a deed to pass this kind of property, it follows, that no person can make a title to those things, without shewing the deed from which he claims. But even before the statute 29 Car. 2. there might have been a *special occupant* of a rent. Thus, if a grant of an annuity or rent had been made to A. and *his heirs* during the life of B. if A. had died during the life of B. his *heir* would have been a special occupant^c. But if a rent had been granted to A. his *executors, administrators, and assigns*, during the life of B., and A. had died, living B., the rent would have been determined, unless there had been an assignment of it: for being a *freehold*, it could not go to the executors or administrators^d. Thus stood the common law; but by the statute of frauds and perjuries, 29 Car. 2. any estate *per auter vie* is made devisable; and if it be not devised away, it shall be assets in the hands of the *heir*, if limited to him: and if not limited to him, it shall go to the executors and administrators, and be assets in their hands. So that since that statute, if an annuity or rent

² Litt. f. 237.
238.

³ Butl. note 1.
332. a.

^b Co Litt. 44. b.
² Roll. ab. 150.
Vaugh. 199.

^c Litt. f. 739.
² Co. Litt. 388. a.
³ Roll. ab. 151.

^d Har. Co. Litt.
41. b. note 4.

rent is limited to A. during B.'s life, and A. dies, living B., A.'s executors shall have it during B.'s life, though they were not particularly mentioned: for the statute not only intended to prevent the scrambling for estates, but likewise to preserve and continue the estate during the life of *cestuique vie*; and the statute in this case does not *enlarge*, but only *preserve* the estate of the grantee ^c.

^c Note D. 3 P.
W. 264.

So too it seems, that the construction of mortgages of incorporeal property differs from that of corporeal things. Thus the equity of redemption in common mortgages cannot be restrained to any particular time, nor limited to the heirs male, or heirs of the body of the mortgagor ^f: nor, as it appears, does the want of any covenant on the mortgagor's part to pay the principal and interest make any difference; for a conveyance of this kind is still a mortgage without any covenant of that sort, nor does it restrain the equity of redemption ^g. I am well aware, that the counsel in *Bonham v. Newcomb* ^h, laid great stress upon the want of covenants on the mortgagor's part, but the Lord Keeper ⁱ, in reversing the Lord Nottingham's decree, and decreeing in favour of the restriction of the equity of redemption, seems to have grounded his decree upon the design of the mortgagor in making a *settlement* by the mortgage, and upon his intention of doing a kindness and benefit to the mortgagee. Upon this account Lord Hardwicke, in the case of *Mellor v. Lees* ^k, observes, that the case of *Bonham v. Newcomb* was an *exception* to the general rule. By these few remarks on

^f 1 P. W. 269.
^g 2 Ch. ca. 147.
^h 1 Vern. 191,
192, 193.

^c 1 P. W. 271.
²⁹¹.
² P. W. 455.
³ P. W. 359.
² Atk. 456.
¹ Vern. 192.
^h 1 Vern. 7. 215.
ⁱ Ibid. 232.

^k 2 Atk. 496.

mort.

mortgages of *landed* property, I only mean to suggest, that in them the equity of redemption cannot be restrained to any particular time, although there be no covenants on the part of the mortgagor to pay principal and interest. But in the case of *Floyer v.*

¹ 1 P. W. 269. *Levington*^l, wherein a mortgage was made of a *rent charge*, with a proviso of redemption *during the life of the grantor*; and no covenants on the mortgagor's part to pay the mortgage money, it was held, that the heir of the grantor could not redeem. A similar case was decreed in the same manner by Lord Hardwicke^m.

^m 2 Atk. 494.
496.

Again, as the statute of limitations, in the case of lands after 20 years possession, bars the plaintiff of his entry or ejectment, so the courts of equity, in imitation of that law, will not allow the mortgagor to redeem after the mortgagee has been in possession for 20 yearsⁿ. But in case of a *rent charge*, though that be not paid or demanded for 20 years, yet as such rent charge is created by deed, no part of the remedy is taken away; and Sir Joseph Jekyll cited the case of *Lord Widdrington v. Jennings*, determined in Lord Harcourt's time, where the court took such a difference between a mortgage of lands and of a rent-charge, and in the latter allowed of a redemption after 80 years^o.

ⁿ 2 Vent. 340.
note B. 3. P. W.
287.

^o 1 P. W. 270.

So likewise in common mortgages, the equity of redemption cannot be foreclosed, unless a bill of foreclosure is brought, and a decree obtained. But where one, being possessed of exchequer annuities for ninety-nine years, borrowed money upon them, and for securing

securing the re-payment thereof made an absolute transfer of the annuities, but with a deed of defeazance, that if the money was paid at such a day, the assignment should be void; the money was not paid at the day; upon which the executor of the mortgagee, after giving notice to the mortgagor of his intention, sold the annuities: it was held in the House of Lords, that the annuities might well be sold, upon giving notice, without any bill of foreclosure ^{P. 1 P. W. 261.} So in a case of a mortgage of stock, Lord Hardwicke observed⁹, "That ^{Tucker v. Wilson.} " in a mortgage of lands a bill of foreclo- ^{2 Atk. 303.} " sure ought to be brought, but in a mort-
" gage of stock it is not necessary."

It is universally admitted, that if a tenant *in tail* of lands suffers a recovery of the estate tail, he will thereby acquire the absolute fee, and not only bar his own issue, but also those *in remainder*. But if a rent *de novo* be granted to one *in tail*, without any limitation of a remainder after the estate tail, and the tenant in tail of the rent suffers a recovery, he will not thereby transfer an *absolute*, but only a *base* fee, determinable upon his death without issue. But if a rent-charge is granted to A. in tail, remainder to B. in fee, there it seems a recovery properly suffered by A. will not only bar his own issue, but the remainder to B. ^{3 P. W. 230.}

So also it is a long established rule, that no estate of freehold in lands can be made to commence *in futuro*^s. Thus, if an estate in lands is limited to commence after the death of J. S., this grant is utterly void. But this rule does not universally hold with respect ^{231. Chaplin v. Chaplin.} ^{5 Co. 94. b.}

speet to *incorporeal* hereditaments; for if a rent *de novo* is granted to commence after the death of J. S., without any intervening particular estate, yet it is a valid grant¹. But it appears, that the grants of rents *in esse*, of advowsons, commons, or reversions, must have the same construction in this respect as grants of lands, for none of them can be limited to commence *in futuro*².

¹ 8 Co. 74. b.
Plowd. 156.

Thirdly, By what operative words incorporeal property will pass.

In considering this division, we will first notice such things as lie in grant, which usually pass with a conveyance of *corporeal* hereditaments, as being *incident* or *appurtenant* thereto.

It has been held that a grant of a manor to J. S. to which there is an advowson appendant, will pass the advowson without an insertion of the words *together with the appurtenances*³. In the like manner, common of pasture will pass by a grant of the lands, to which it is appendant⁴. So if lands, to which there is common of pasture appendant, be recovered in a *novel disseisin*, it is also a tacit recovery of the common⁵.

³ 10 Co. 64. a.
b.
Perk. f. 116.
⁴ Perk. f. 104.

⁵ Co. Litt. 154.
b.

By a grant of a reversion, the rent, which is incident thereto, will pass without any particular words for that purpose⁶. In short, it is generally true, that by a grant of the *principal* every thing *incident* thereto will pass, according to the maxim of law, *Accessorium non ducit, sed sequitur suum principale*⁷. Upon this principle it is, that if a man be remitted to the principal, he shall also be remitted to the accessory. Thus, if there be tenant in

⁶ Litt. f. 229.

⁷ Co. Litt. 152.
a.

tail

tail of a manor, to which there is an advowson appendant, and the tenant in tail enfeoffs A. of the manor with the appurtenances, who afterwards re-enfeoffs the tenant in tail, reserving to himself the advowson; in this case when the tenant dies, and the issue are remitted to the manor, they are also remitted to the advowson, although it was severed from the manor ^b.

^b Co. Litt. 349.

Indeed there are some incidents so inseparable from their principal, that they cannot be severed ^c. Thus common of pasture cannot be separated from the land, to which it is appendant, if it be *in esse* ^d. So fealty is an inseparable incident to every tenure and reversion ^e. Therefore if a man, seised of a feignory by homage, fealty, and rent, grants the homage, the fealty shall also pass, for they cannot be separated by any saving in the grant ^f. But though rent is an incident to the reversion, yet it is not an inseparable one ^g.

^b.

^c Co. Litt. 93. a.

^d Perk. 104.

^e Co. Litt. 93. a.

^f Ibid. 150. b.
151. a.

^g Ibid. 93. a.

In the next place we will consider the operative words of a conveyance in passing such incorporeal hereditaments as are not incident to lands, and may or may not pass with the lands. And here it is observable, that as the design of the law is to construe every grant as near the intention of the parties as possible, when such intention does not counteract any fixed rules of law, so it frequently creates a good grant without any regular form of conveyance. Thus we find words of covenant sometimes sufficient to create a grant: as where A. granted and agreed with J. S. his heirs and assigns, that it should be lawful for them

them at all times afterwards to have and to use a way by and over the close of A. ; in consideration whereof J. S. agreed to pay A. a certain sum per annum. Now this was held to be a good grant of the way, though it only had the appearance of a covenant^b. So if a man binds his goods and lands in the payment of a yearly rent to A. this is a good grant of a rent-charge with a power of distress, though there be no express words to authorize a distressⁱ.

^a 3 Lev. 305.

ⁱ Co. Litt. 147.

^a Roll. ab. 422.

ⁱ Co. Litt. 301.

^b.

But though the law in these instances has established grants in order to effectuate the manifest intention of the parties, because there can be no inconsistency in making such a construction ; yet when any such inconsistency does appear, it must necessarily make those grants void. Thus the word *grant* is peculiarly adapted to pass things, which lie in grant, though there may be other words that can serve the purpose^k. Now the insertion of this word *grant* in a conveyance is an indication of the party's intention to pass *incorporeal* hereditaments. If therefore *incorporeal* things are intended to be passed by a conveyance, which is principally suited to transfer *corporeal* property, and in that conveyance the word *grant* is omitted, the law cannot so far deviate from its own fixed rules, as to establish a grant of this nature by a conveyance of this kind. Therefore, if a *reversioner* in fee makes a *feoffment* in fee (without inserting the word *grant*, and without ousting the particular tenant) by this *feoffment* the *reversion* will not pass by way of *grant* with attornment ; for it appeared to be the intention

tion of the reversioner, that it should pass by force of the feoffment, and livery^l. I say,¹ ^{2 Roll. ab. 56. pl. 2.} without inserting the word *grant*, for if it had been inserted, the *feoffment* might clearly be taken as a *grant*: for Lord Coke^m tells us,^m ^{Co. Litt. 301. b.} that *dedi* or *concessi* may amount to a grant, ^{Vide 2 Roll. ab. 56. pl. 1.} a feoffment, a gift, a lease, a release, a confirmation, or surrender, and it is in the election of the parties to use them to which of those purposes he chooses. Upon the same principle, if a man (without inserting the word *grant*) *releases*, *surrenders*, or *confirms*, when the releasee, surrenderee, or confirmee has no estate for the release, &c. to work upon, it will not enure as a grant, release, surrender or confirmation. But on the contrary, if the word *grant* be used with that of *release*, &c. although there be no estate for the release, &c. to work upon, yet it is a good *grant*ⁿ. ^{n Vide Litt. f. 541, 542.}

I shall now endeavour to point out the several conveyances, by which *incorporeal* property may or may not pass, though the word *grant* be omitted; whether they are granted by themselves, or with *corporeal* hereditaments. When things which lie in grant are intended to be conveyed together with corporeal hereditaments by *feoffment*, it is absolutely necessary to insert the word *grant*; for this species of property does not pass by the *livery*, but merely by the word just mentioned. This is agreeable to the opinion given by Sir J. Palmer, as cited in Bridgman's Conveyancing^o.

As incorporeal hereditaments, relating to or issuing out of lands^p, may be limited to

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uses,^p ^{Sup. 103. and 27 H. 8. c. 10.}

^o 1 Bridg. Con. 323.

uses, so may they be bargained and sold. Now in a bargain and sale, which is always supposed to be made for a valuable consideration, the words *bargain* and *sale* are the most suitable words to raise the use, whether such use is to arise out of corporeal, or incorporeal hereditaments. Therefore there can be no necessity to insert the word *grant* in this conveyance, in order to pass *incorporeal* hereditaments.

As there may be a *surrender* of things, which lie in grant^a, and as the word *surrender* is the most applicable to that conveyance, there seems to be no necessity to make use of the term *grant*, when incorporeal hereditaments are surrendered. But, as was before observed, there should be a proper estate in the surrenderee for the surrender to work upon, otherwise it can be no surrender; and as a grant it cannot operate, for the word *grant* is omitted. The same observations will apply to a *confirmation*.

With respect to the conveyance of *lease* and *release*, when the whole of the property, corporeal as well as incorporeal, is particularized, and conveyed to the bargainee for a year, by the words *bargain and sell*, the bargainee has such an interest in them, as renders him capable of receiving a *release* of them: for *incorporeal* property may be released, as well as *corporeal*^b. In making then this *release*, the same words may be used with respect to the one, as the other species of property; for a *lease* and *release*, like a bargain and sale, is equally applicable to pass *incorporeal* as well as *corporeal* hereditaments, and

^a Vide Moor, 34.

^b Pl. 113.

^c Cro. Jac. 210.

^d Cro. Eliz. 166.

^e Co. Litt. 338.
^f Id.

^g Shep. T. 319.

and therefore materially differs from a feoffment with livery; which is only proper to convey lands. Now the only, and very words of a release, as used by Littleton ¹ Litt. f. 449; himself, are *remise*, *release*, and *quit claim*; which clearly shews, that he did not think the word *grant* to be at all necessary. However, it would be perhaps prudent to insert that word in the conveyance of lease and release.

It is to be observed, that by the words *tenements* and *hereditaments* an advowson in gross will pass, though not by the word *lands* ¹ 3 Atk. 464. So a grant of all *lands* and *tenements* in D. will pass not only a *reversion*, but also a *rent* issuing out of the lands ^v; and Perkins says ^w, ^v 2 Roll. ab. 57; that those words will pass an advowson in gross. But commons in gross, annuities, and ways, cannot pass by those words ^x. For the different names by which things in *general* pass in conveyances, the reader is referred to Co. Litt. from fol. 4. a. to 6. a. and also to the different abridgments, under title *grant*. I shall only take notice here, that it would be advisable in conveyances to describe or mention such *incorporeal* hereditaments as are intended to pass: as for instance, common in *gross* will not pass by any of the words above mentioned, nor by a grant of *all pasture* ^y.

Fourthly, The manner in which reversions, and rents are granted.

I have already had occasion to point out the particular conveyances, by which incorporeal hereditaments may pass. Indeed in passing advowsons in gross, reversions, and

commons in gross, the conveyances by bargain and sale, and lease and release, are the most frequently resorted to. With respect to *rent-charges*, they are sometimes limited in consideration of marriage in strict settlement, in the same manner as settlements of landed property. In doing this it appears to be the most desirable way to limit the estate to the grantee, by way of grant at common law, to the uses and intents intended to be declared; this will give the grantee seisin to serve the uses, and all uses declared thereon will be executed by the statute*. So a man seised of a *rent-charge* in fee may covenant to stand seised of it, and the uses raised by that covenant may be well executed by the statute of uses†.

* Bull. note 1.
Co. Litt. 298. a.

† 2 Vent. 260.
266.
Lade v. Parkes.

I shall close this chapter on grants by subjoining the form of a grant of a *rent-charge* during the life of the grantor by way of grant at common law, and demise of a term to a trustee for the better securing the payment of the rents. This kind of grant will shew the nature of a grant of a *rent-charge*, whether in fee, for life of the grantee, or in tail, and will give me also an opportunity of explaining some peculiarities relating solely to a grant of a *rent-charge* *pour autre vie*.

However, as the statute of 17 Geo. 3. c. 26. has made several regulations with respect to grants of *rent-charges*, or annuities for life, I will briefly point out those regulations; and also add a few remarks on the liberty of re-purchasing a *rent-charge* or annuity; which will lead me to consider the nature of an annuity or *rent-charge*, as distinguished

guished from a mortgage or other security for money.

The 17 Geo. 3. c. 26. was enacted in order to regulate the raising of money by way of annuity, or rent-charge. It first directs, that all grants of annuities for life shall be *enrolled*; and such enrollment shall contain the names of all the parties, witnesses, &c. otherwise the grant to be void. With respect to this part of the statute, Mr. Butler observes^b, “ It is to be wished, that the legislature would enable persons redeeming, or re-purchasing annuities granted by them, to enter an account of such redemption or re-purchase upon the register; for as it is an impeachment of a person’s credit, that annuities of this nature should be recorded against him, it is but reasonable, that when he has redeemed, or re-purchased them, that should be as publickly known as his grant of them.” The second section directs, that before judgment shall be entered of record upon any warrant of attorney for recovering the annuity, or before execution shall be sued out upon any judgment already entered, a memorial shall be enrolled as aforesaid. By the third section all deeds for granting annuities shall contain the consideration (which shall be in *money* only) and the names of the parties at full length.—S. 4. If any part of the consideration be returned, or if any notes are given, and those notes are not paid when due; or if *goods* be given as a consideration, the court may order the deed to be cancelled^c.—By s. 6. all contracts for the purchase of annuities with any person under

^b Butl. note. f.
Co. Litt. 290. b.

^c Vide on this
head. 3 Term
Rep. 298. 554.

the

the age of twenty-one years shall be void : and the persons procuring or soliciting minors to grant, &c. shall be punished by fine and imprisonment.—By s. 7. the same punishment shall be inflicted on solicitors, scriveners, &c. taking more than ten shillings for every £.100, for procuring money to be lent by way of annuity.—The s. 8. contains cases excepted out of the statute, and declares that it does not extend to annuities given by *will*, or *marriage settlement* ; nor to any annuity or rent-charge secured upon lands of equal, or greater value, whereof the grantor was seised in *fee simple*, or *fee-tail* in possession, at the time of the grant ; or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal, or greater annual value, than the said annuity ; nor to any *voluntary* annuity, granted without regard to pecuniary consideration ; nor to any annuity or rent-charge granted by any body corporate, or under any authority or trust created by act of parliament ; nor to any annuity, where the sum to be paid does not exceed £.10 annually, unless there be more than one such last-mentioned annuity from the same grantor, or grantors, to or in trust for the same person or persons.

With respect to the clause of *re-purchase*, usually inserted in grants of rent-charges, or annuities for life, in order to understand the nature of such *re-purchase*, we must observe, that when an annuity or rent-charge is granted for life, &c. it is reckoned an *absolute sale* to the grantee, or purchaser ; and therefore, like other sales, the grantee may either keep

keep his purchase, or dispose of it at his pleasure: nor can the grantor compel the purchaser to re-grant the rent-charge, unless in the original grant there is a mutual covenant, that the grantor may be at liberty to *re-purchase* the same. When such a clause then is introduced in the grant of a life annuity, or rent-charge, it is nothing more than a *purchase*, with a liberty to *re-purchase*^d. It differs then from a mortgage or security for money lent, in these principal points:—A mortgage cannot be made irredeemable, or in other words, the equity of redemption cannot be restrained. In a mortgage the principal debt still continues, until the equity of redemption is foreclosed; whereas, upon the purchase of an annuity, the principal is gone for ever, and even if there be a liberty to re-purchase, and such re-purchase is made accordingly, still the money paid upon that occasion is not the payment of a debt secured, but the consideration money of a new purchase. So a mortgage being solely a pledge or security for money lent, equity considers it but as the *personal* estate of the *mortgagee*, though the mortgage be *in fee*^e; but as an annuity is not reckoned as a security for money lent, but as an absolute sale, it must be considered as the real estate of the grantee, if it has a freehold quality^f.

However, as courts of equity lean very much against contracts of this nature, as tending to obtain more than *legal* interest for money, they have been ever anxious and studious to find out pretences to construe these sales of annuities as mere securities for money,

^d Vide 1 Vez, 403.

^e Bull. note 1. Co. Litt. 208. b.

^f 3 Atk. 279. 1 Vez. 403.

3 Atk. 279.

ney, and thereby to suffer a redemption as in the common case of mortgages. To use the words of Lord Hardwicke, " There has been a long struggle between the equity of this court and persons who have made it their endeavour to find out schemes to get exorbitant interest, and to evade the statutes of usury." In deciding therefore upon cases of this nature, the chancery has generally considered them in two lights, 1st, Whether they are to be reckoned (considering all the circumstances) as absolute sales, or merely as securities for money lent. 2dly, Admitting them to be sales, whether there be any grounds to *relieve* against them. These were the considerations in *Lawley v. Hooper**, where a man, being entitled to a rent-charge of £.200 per annum, and being in distressed circumstances, sold £.150 per annum to J. S. part of the said sum of £.200 a year, for the sum of £.1050, with a liberty to re-purchase and *redeem* the same, upon payment of all arrears of the said annuity, and also of the principal sum of £.1050, together with £.75 besides. Upon a bill brought to *redeem*, upon payment of *principal* and *interest* only, the Lord Chancellor considered the case upon the questions above stated; and as to the first, he thought that there was a strong foundation to consider it as a security for money; because the parties using the word *redeem*, as well as *re-purchase*, shewed, that it was their intention, that it should be a power of *redemption*. He however admitted, that there was no occasion to determine that point; for supposing it to be a sale, it ought, from

* Ibid. 278.

from the peculiar circumstances of the case, to be relieved against; and therefore he decreed a redemption upon payment of principal and interest only.

So in another case^b, where C. H. gave the residue of her estate real and personal to B. in trust to pay the produce thereof to Lady D. for life, for her separate use, remainder over, and appointed B. executor: Lady D. took up £.120, for which sum she granted an annuity of £.120, for which sum she granted an annuity of £.20 during her life, and directed B. to pay the same out of the produce of her life estate; and this coming before the court, the Lord Chancellor, judging of the intention of the *will* under which Lady D. claimed, was of opinion, that Lady D. might contract for raising a sum of money by way of loan, but not by way of annuity for her own life, as that would be too large an *anticipation* of the produce of the trust estate, and against the *intention* of the *testatrix*. He therefore decreed a redemption (*though made irredeemable*) upon payment of principal, and interest from the time of the grant.

Thus tooⁱ, where T. S. being tenant for life, created a term for 99 years, if he should so long live; and being indebted to S. S. in the sum of £.6600, made thirteen several grants; twelve of £.50 per annum, and one of £.60 per annum, to S. S. his *heirs* and *assigns*, during the life of T. S., to be issuing out of the lands of which he was tenant for life, which lands were by another indenture of the same date demised to trustees for two several terms, in *satisfaction* and *discharge*

^h 3 Atk. 541.
Caverly v. Dudley.

ⁱ 1 Vezey, 402.
Long v. Scawen.

charge of the said several sums; in this conveyance it was agreed, that as long as S. S. should quietly hold the premises unmolested by T. S. upon the trusts therein mentioned, T. S. should not be personally liable, nor be sued in law or equity, nor his goods &c. be liable to the payment of the annuities: provided always, and agreed, that it shall be lawful for T. S. in *satisfaction* and *discharge* of the several sums, from time to time to repurchase and *redeem* the said rents at the same price, upon notice given on any of the four quarterly days, on which they became payable during life. Then the prior term of 99 years was declared to be assigned for the better securing the said several annuities. The question in this case was, whether these annuities should be deemed part of the *personal* or *real* estate of S. S. It must be observed, that the annuities were limited to S. S. his *heirs* and *assigns*. Lord Hardwicke held these annuities to be the *personal* estate of the grantee, for three reasons: 1st, Because during the existence of the prior term, the profits of the annuities and of the estate, which the trustees covenanted to apply for that purpose, must arise out of *the term*; therefore, as the annuities were to arise out of a chattel and personal interest, they must be personal also. 2^{dly}, The method taken to grant the annuities shew, that the parties meant to make them redeemable, and as a security for money advanced. For the lands were not granted absolutely to S. S. but the debt was divided into so many parts, applying it to the particular annuities granted, turning it into a purchase

chase of so many annuities; the meaning of which was for the convenience of T. S. that he might redeem any of these annuities upon payment of the money: otherwise there could be no sense in it. 3dly, That, as in the *proviso*, the words *re-purchase* and *redeem* are used synonymously, and as the power of repurchasing was there called *an equity of redemption*, it shewed, that the parties intended to make these annuities *redeemable*, as securities for money advanced, and of course *personal* estate. His Lordship therefore decreed accordingly.

However, using the word *redeem* (notwithstanding the opinion of Lord Hardwicke in the above case) does not, if there are no other circumstances, make the grant of an annuity merely a security for money. Thus ^{k, * 5 Bro. P. C. 240.} where A. for £.2100 granted an annuity or rent-charge of £.300 per annum to B. for his own life by a *previous* grant of the rent-charge, by way of grant at common law, and then by a demise of a term to trustees. The estate, upon which the annuity was charged, was represented to be of the yearly value of £.1000, with a liberty of *redeeming*, upon payment, &c. A. suffered the annuity to run greatly in arrears; and the estate turned out to be subject to prior incumbrances exceeding its annual value. Upon a bill being brought for a specific performance of the covenant to pay the annuity, A. offered to *redeem* upon payment of principal and interest only; but the court decreed him to pay up all the arrears of the said annuity (which amounted

¹ 2 Atk. 235.
Stanhope v.
Cope.

amounted to a great sum) and then if he wished to redeem he was at liberty so to do. Here we only see the word *redeem*; and yet the court only allowed of a *re-purchase*. So in a similar case, Lord Hardwicke held¹, that it would be inconsistent with the rules of equity to decree a *redemption* upon the grant of an annuity.

^m 3 Atk. 281.
282.

ⁿ 5 Bro. P. C.
240.

The essential difference between a *redemption* and *re-purchase* seems to be this, viz. when an annuity is deemed a *pledge* or *security* for money lent, and consequently in its nature *redeemable*, the court will decree a redemption *ab initio*, that is to say, it will decree a payment of the principal sum, with legal interest from the day of the date of the grant; and an account to be taken of all sums received by the grantee on account of the annuity; which sums must be first applied in payment of the interest due on the principal, and then in sinking the principal itself^m. But before a person can *re-purchase*, he must pay all the *arrears of the annuity*, from the date of the grant up to the day he offered to *re-purchase*ⁿ.

The

*The Form of a Grant of a Rent-charge for the
Life of the Grantor.*

T H I S indenture of three parts,
made the day of
in the 31st year of the reign of our sovereign
lord George the Third, by the grace of God
of Great Britain, France, and Ireland, King,
Defender of the Faith, and so forth, and in
the year of our Lord 1791, between An-
drew Ashton, of in the county
of Middlesex, Esq; of the first part; Benja-
min Barton, of Walton upon Thames, in the
county of Surry, Gentleman, of the second
part; and Charles Cary, of the parish of St.
Andrew's, Holborn, in the county of Mid-
dlesex aforesaid, Ironmonger, of the third
part. *Whereas (this word always begins a*
RECITAL. The recitals, sometimes placed in
grants of this kind, are a short account of the
settlement or will under which the grantor
claims—the agreement for the purchase of the
annuity—when, and in what manner, and by
whom it is to be paid). And whereas it was
agreed, upon the grant of the said annuity,
that for the further, better, and more ef-
fectually securing unto the said B. Bar-
ton, his executors, administrators, and as-
signs, the due, punctual, and regular payment
of the said annuity, or clear yearly sum of £.
the same should be charged upon, and
payable, and issuing out of all those the said
de-

devised (or settled, as the case may be) messuages, lands, &c. with their, and every of their rights, members, and appurtenances, (*this agreement is to make the ANNUITY a RENT-CHARGE*) and that the same estate, or hereditaments should be devised to a trustee for a term of years, upon the trusts, and in the manner hereinafter declared and expressed, of and concerning the same. Now this indenture witnesseth, That in pursuance of the said recited agreement, and for and in

Consideration.

of the sum of £. of lawful money of Great Britain, to the said A. Ashton in hand well and truly paid, by the said B. Barton, at and before the sealing and delivery of these presents; the receipt and payment of which said sum of £. he

Receipt.

the said A. Ashton doth hereby acknowledge, and of and from the same, and every part thereof, doth acquit, release, and discharge the said B. Barton, his executors, administrators, and assigns, and every of them, for ever, by these presents (A): he the said

Grant.

A. Ashton hath granted, bargained, sold, and confirmed, and by these presents doth grant, bargain, sell, and confirm unto the said B. Barton, his executors, administrators, and af-

(A) This is a general receipt for the consideration money: besides which, it is usual to indorse a receipt on the back of the deed. However, if a receipt is indorsed, but the consideration money is proved *not* to be paid, such

assigns, (B) for and during the natural life of him the said A. Ashton, one annuity or clear yearly rent-charge or annual sum of £.

of lawful money of Great Britain, to be yearly issuing, payable, going, had, received, and taken by him the said B. Barton, his executors, administrators, and assigns, by and out of *all* those the said messuages, (*here the lands must be recited*) together with all and singular the rights, members and appurtenances

such receipt is of no avail, and the vendor has an equitable lien upon the estate sold ^a. It is a rule of equity, that from the time of an agreement for a purchase until the whole of the purchase money is paid, the vendee becomes a *trustee* for the vendor, as to so much of the purchase money as is unpaid ^b: and the lands are subject to this charge, not only as against the vendee, but against his heir, or any claiming under him as purchaser, with notice of the equitable lien ^c.

(B) Before the statute of frauds and perjuries an estate *per auter vie* (as this is) was not considered as a *personal* estate, even if limited to the grantee, his *executors, administrators, and assigns* ^d: But it has since that statute been settled, that an estate *per auter vie*, when limited to the *executors, &c.* of the grantee, must be deemed *personal* estate ^e: However, an estate *per auter vie*, when limited to the grantee and *his heirs*, is liable to debts by specialty, and is within the statutes of fraudulent devises, 3 and 4 W. and M.

c. 4. ^f

^a Vide 2 P. W. 291. Coppin v. Coppin,

^b 3 Atk. 273. ^c Vera. 267, 268.

^c 2 Vezey, 622.

^d Supra.

^e 2 P. W. 382. Duke of Devon v. Atkins.

^f Vide 2 Vera. 719.

Also 14 Geo. 2.

c. 20. s. 9.

^f Vide 3 Atk. 460. Westfalling v. Westfalling.

Habendum.

tenances thereto belonging, or in any wise appertaining; and the reversion and reversions, yearly and other rents, issues, and profits of all and singular the said hereditaments, and premisses. **To have**, hold, receive, perceive, take, and enjoy the said annuity or

clear yearly rent-charge or annual sum of £. and every part thereof, unto the

said B. Barton, his executors, administrators, and assigns, for and during the natural life of the said A. Ashton to be paid and payable to him the said B. Barton, his executors, administrators, and assigns, at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, by four equal quarterly payments, between the hours of 10 and 12 o'clock in the forenoon of the several and respective days following, (*here the days must be specified*) in each and every year, by even and equal portions, without making any deduction, defalcation, or abatement out of the same, or any part thereof, for or in respect of any taxes, charges, assessments, payments, or other matter, cause, or thing whatsoever, taxed, charged, assessed, or imposed upon the said messuages or tenements, lands, hereditaments, and premisses, so charged with the payment of the said annuity or clear yearly sum of £.

or any of them, or any part thereof, or on the said B. Barton, his executors, administrators, or assigns, in respect thereof, by authority of parliament, or otherwise howsoever, together with a proportionable part of the said annuity or clear yearly sum of £.

for the time which shall elapse between the last of the said days of

of payment next preceding the decease of the said A. Ashton, and the day or time of such his decease, the first payment of the said annuity to begin and be made on the

day of next ensuing the date of these presents.

And the said A. Ashton, for himself, his heirs, executors, administrators and assigns, doth hereby grant, covenant, and agree to and with the said B. Barton, his executors, administrators, and assigns, that in case the said annuity or yearly rent-charge of £. or any part thereof, shall hap-

Covenant that
the grantee
may distress

pen to be behind or unpaid by the space of 14 days next over or after any of the said days or times hereby expressed and appointed for the payment thereof, and whereon the same ought to be paid as aforesaid, then and in every such case, or as often as it shall so happen, it shall and may be lawful to and for the said B. Barton, his executors, administrators, or assigns, into and upon the said messuages or tenements, lands, hereditaments, and premisses, so charged with the payment of the said annuity or rent-charge of £. or expressed or intended so

to be as aforesaid, or into and upon any part thereof, to enter, and Distrein for the same annuity or rent-charge of £. and all arrears thereof; and the distress and distresses then and there found and taken to take, lead, drive, carry away, and impound, and the same in pound to detain and keep, until the same annuity or rent-charge of £.

and all arrears thereof, and all costs, charges, and expences whatsoever, sustained or occasioned by or attending the making, taking,

and keeping any such distress, shall be fully paid and satisfied; and in default of payment thereof in due time after any such distress or distresses shall be made and taken, to appraise, sell, or otherwise to dispose of such distress or distresses, or any part thereof, or otherwise to act therein according to the due course of law, in the same manner, in all respects, as landlords are by act of parliament authorized to do, in respect to distresses for arrears of rent upon leases for years; to the intent that thereby and therewith the said B. Barton, his executors, administrators, and assigns, shall and may be fully paid and satisfied the said annuity or yearly rent-charge of £. and all arrears thereof, or so much thereof as shall then be remaining due and unpaid, and all costs, charges, and expences whatsoever, sustained or occasioned by the non-payment thereof. (C) **Pro-**
vided always, and the said A. Ashton doth hereby

Covenant that
the grantee
may enter.

(C) This covenant makes the rent a *rent-charge*, for without it it would remain a *rent-secck*. The difference between these rents at the common law was material. The latter could not be recovered by way of *distress*; and indeed not at all, if the grantee had never been seised of it: but a distress was the proper remedy to recover the former^s. But the difference, which subsists between these rents at this day, is merely nominal; for the statute 4 Geo. 2. c. 28. s. 5. has extended the same remedy by *distress* to all rents alike, thereby

^s Litt. s. 217.

hereby for himself, his heirs, executors, administrators, and assigns, further grant, covenant, and agree, to and with the said B. Barton, his executors, administrators, and assigns, that in case the said annuity, or yearly rent or sum of £. or any part thereof, shall at any time during the natural life of the said A. Ashton happen to be behind or unpaid by the space of twenty-eight days, next over or after any of the said days or times appointed for the payment thereof as aforesaid, then, and in such case, and as often as it shall so happen (although no lawful or formal demand shall be made) it shall and may be lawful to and for the said B. Barton, his executors, administrators, and assigns, into and upon all the said messuages or tenements, lands, hereditaments, and premises, so hereby charged therewith as aforesaid, or into and upon any part thereof in the name of the whole, to enter, and the same to have, hold, and enjoy, and the rents, issues, and profits thereof, and of every part thereof, to receive and take, to and for his and their

U 2

own

thereby abolishing all essential distinction between them^b. It would exceed the limits^a 3 Comm. 6. of this work to enter into a discussion of the laws of distress; but I shall refer to Sir W. Blackstone's Commentaries, vol. 3. from pa. 6 to 15. also to Har. Co. Litt. 47. a. Notes 11, 12, 13, 14, 15, 16, 17, 18. and fol. 47. b. notes 1, 2, 3, 4, 5, 6, 7, 8, 9, 10. &c. Vide also Gilb. Law of Distress *passim*.

own use and benefit, until he or they shall be thereby, or therewith, or otherwise, fully paid and satisfied the said annuity or yearly rent or sum of £. and all arrears thereof, and also so much of the said annuity, or clear yearly sum of £. as shall incur and grow due during such time as the said B. Barton, his executors, administrators, or assigns shall be in possession of the said hereditaments and premises after such entry as aforesaid, and also all such loss, costs, charges, damages, and expences whatsoever, which shall be sustained, or occasioned by reason or means of the non-payment of the said annuity or yearly rent-charge, or any part thereof, or on the days and times herein-before expressed and appointed for the payment thereof (D). And the said A. Ashton,

Covenant for
payment of the
annuity, and
rent-charge.

(D) This covenant to enter and hold creates such an interest, as entitles the grantee to enter, and make a lease, in order to recover the possession by ejectment. In a case¹ of this nature, it was objected that the grantee by his entry could only obtain an estate *at will*, and not an estate of *freehold*, for want of livery, and therefore he could not make a lease: but it was adjudged, that an *interest* vested in the grantee, when the rent was in arrear, which interest he might reduce, when it arose, into possession by ejectment. It was formerly held, that in this case an *actual* entry was necessary in order to support an ejectment; it was, however, settled previous
to

¹ Jemmot v. Cowley.

¹ Lev. 170.

¹ Saund. 112,

113.

¹ Sid. 223.262.

344.

¹ Kobl. 784.

915.

Raym. 135.

158.

Ashton; for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree, to and with the said B. Barton, his executors, administrators, and assigns, that he the said A. Ashton, his heirs, executors, or administrators, shall and will well and truly pay, or cause to be paid, unto the said

to the statute of 4 Geo. 2. c. 28. that the *general confession* was sufficient for that purpose, without the proof of an actual entry ^{k.}

A power of entry may be limited by *way of use*. Thus, if by a feoffment, lease and release, fine, or recovery, lands are conveyed to A. and his heirs, to the use and intent that B. may receive out of the lands so conveyed a certain annual rent or sum; and upon this further use and intent, that if such annual sum, or any part of it, be behind or unpaid by a certain time, it shall be lawful for B. and his assigns to enter upon, and hold possession of the land, and receive the rents and profits of it, untill the arrears are satisfied:

here as soon as the rent is in arrear, a use, which is served out of the original seisin of the feoffee, releasee, conusee, or recoveree, vests in the person to whom the power is given; which use is immediately executed by the statute of uses. This possession, so acquired, he has a right to keep till the purpose for which it is executed is satisfied, and then the use determines. By virtue of this estate, he may make a lease for years to try his title in ejectment; and if he assigns the annual

^{k.} 1 Salk. 259.
Gilb: eject. 21,
last edit.

said B. Barton, his executors, administrators, and assigns, for and during the natural life of him the said A. Ashton, the said annuity, or yearly rent, or sum of £. free and clear of and from all taxes, charges, rates, and all other deductions whatsoever, parliamentary or otherwise, at the place, days, and times, and in manner and form hereinbefore expressed, limited, and appointed for the payment thereof, together with a proportionable part of the same annuity, or yearly rent or sum of £. for the time which shall elapse between the last of the said quarterly days of payment next preceding the decease of him the said A. Ashton, and the day or time of such his decease, (E). And this

annual sum, this right of entry and perception of the rents, and profits of the lands charged with the payment of it, passes with it to the assignee¹.

¹ Butl. note 3.
Co. Litt. 203. a.

It must be noticed, that it is generally true, that no person can take advantage of a *condition of entry*, unless there is a previous *demand* of the rent^m. But it seems, that by the *special consent* of the parties, an entry may be made in default of payment of rent *without demand*ⁿ.

^m Co. Litt. 201.
b.

ⁿ 5 Co. 40. b.
1 Roll. ab. 459.

(E) With respect to this covenant for payment of the annuity or rent-charge, we are to observe, that upon every grant of a rent-charge the law has provided two remedies for the recovery of it, viz. by *distress*, or by *writ of annuity*^o. But though the grantee is allowed

^o Litt. f. 219.

this indenture further witnesseth, that in pursuance of the said agreement, and for the consideration hereinbefore expressed; and for the further, better, and more effectual securing the payment of the said annuity, or yearly rent, or sum of £. at or on the days and times aforesaid, and in the manner aforesaid; and also in consideration of the sum of five

allowed both of these remedies, yet he is only permitted to make use of one of them, that is to say, either to charge the *person* of the grantor by writ of annuity, or the *lands* by distress. This determination must appear by some solemn act in a court of record. Therefore, the mere purchasing a writ of annuity in the name of the grantee, and entering it of record, does not determine the election, unless the grantee appears thereto, &c. ^{p. Co. Litt. 145,} So if the grantee distresses, still he may bring ^{a.} a writ of annuity, and discharge the lands; unless indeed he *avows* in a court of record, which is held to be a determination of his election, before any judgment given ^{q.} This ^{p. Co. Litt. 145,} double provision, however, by distress, and ^{b.} writ of annuity, does not extend to *rent-charges* created by *will*, or granted for equality of partition, or in lieu of dower, for these not being *personal* can only be recovered by distress^{r.} Indeed a *rent-seccke* cannot be recovered by either of these remedies^{s.} and a ^{t. Co. Litt. 144 b.} rent created by way of *reservation* to the grantor only by distress^{t.} So if a man grants ^{u. 6 Co. 58. b.} that if A. be not paid the sum of ten shillings ^{v. 1 Roll. ab. 226,} yearly, ^{Co. Litt. 144. p.}

yearly, then he may distrein for it in the manor of D.; now, as there is no grant of an annuity in this case, but only such a grant as will create a *rent-charge*, no writ of annuity will lie for the recovery of it ^v.

^v Litt. f. 221.
Co. Litt. 146. b.

It is held, even where this double remedy is given to the grantee, that the grantor may by an express provision exempt his person from the writ of annuity, and only charge the land: but on the contrary, no express agreement can exempt the land from the distress after it has been expressly charged with it; for a subsequent clause cannot altogether defeat the former part of the deed ^w. So if a man grants a rent-charge out of the manor of Dale (wherein he has nothing) with a proviso to exempt his person from the writ of annuity, this proviso is altogether repugnant and void ^x.

^v Litt. f. 220.
Co. Litt. 146. a.

^v Ibid.

In some cases the remedy by *distress* is the most eligible, and proper; for if a rent-charge is granted to B. in fee, the grantee and his heirs may distrein for ever; but if he brings a writ of annuity, the rent-charge in fee is turned into an annuity for life, unless the grantor had granted for *himself* and *his heirs*, in which case the heir will be bound so far as he has assets by descent ^y. Considering, however, the secure remedy by distress (where the value of the lands prove sufficient to answer such distress) compared with a personal security, the remedy by distress seems to be in most cases the most desirable, except in the particular case where a termor for years grants, for himself and *his heirs*, a rent-charge in fee to be issuing out of the lands

^v Co. Litt. 144. b.
ⁱ Roll. ab. 226.

lands held under the term : in this case if the grantee distrains, and thereby throws the charge off of the person of the grantee, when the term expires the rent charge is extinct, because the grantor could not charge the land longer than his interest continued in it : but on the other hand the heirs of the grantor are bound in a writ of annuity, so far as they have assets².

² Poph. 87.

By the common law, the heir, executor, or administrator of a man seised in fee simple or fee tail of a rent-charge, rent-service, rent-socke, or fee-farm, had no remedy to recover the arrearages incurred in the life-time of the owner of such rents ; but by the statute 32 Hen. 8, c. 37. a double remedy is given to the executors or administrators in such cases, viz. by distress, and by action of debt^a. So at the common law, if there had been a rent granted to A. for the life of B. ; and A. had died during B.'s life ; the executors of A. might have brought an action of debt, but could not distress for the arrearages incurred during A.'s life : but the above-mentioned statute extends also to this case^b. If at this day there be a grant of a rent-charge during the life of the grantor (who is but a tenant for life himself of the lands charged with the rent) and the tenant for life or grantor dies (whereby the rent is extinguished) it seems that the grantee cannot in this case distress upon the lands in the possession of the remainder-man ; for he claims by a title paramount to the grantor, who cannot charge any other person's interest but his own^c. But though the grantee cannot distress in this

^a Co. Litt. 162.

^b Lutw. 387.

^b Co. Litt. 162.

^a note 4.

Lutw. 387.

⁴ Co. 49 b. 51. a.

Ld Raym. 172.

¹ Leon. 302.

^c Vide

Co. Litt. 162. b.

² Vern. 612.

Lord Fairfax v.

case, Lord Derby.

case, yet he or his executors may bring an action of debt against the executors of tenant for life^d.

^d Ibid. Vide Co. Litt. 162. b. as to the distinction between this and Edrick's case, 5 Co. 118. a. b.

^e Vide 2 Stra. 763.

^f 5 Bro. P. C. 340.

^g 5 Bro. P. C. 342.

^h Dougl. 97. Cotterel v. Hooker.

ⁱ Ibid.

These are the material incidents to a grant of a rent-charge, without inserting this *covenant* for payment of the annuity: it is, however, useful in many respects. Thus, in case of an insufficient distress, it affords the modern remedy by action of covenant^e, instead of resorting to the remedy by writ of annuity. Besides, a bill in equity will lie to have a specific performance of this covenant. Thus, in a case^f where the lands, on which a rent was charged, were found to be subject to prior incumbrances, exceeding their annual value, but other lands afterwards descended to the grantor; upon a bill brought by the executors of the grantee, to have a specific performance of the covenant to pay the annuity^g, it was decreed, that all the arrears of the annuity should be paid, and also interest upon the arrears from the master's report. So too, suppose there be a covenant to pay an annuity, and for the better securing the annuity a bond is entered into with a penalty; if after the bond is forfeited at law, the obligor becomes insolvent, and is discharged under an insolvent act (whereby the security given by the bond is gone) the obligee may still bring his action of *covenant* for the arrears of the annuity incurred *after* the discharge^h. If in this case the obligor had become a bankrupt, and the obligee had not made any use of the penalty under the commission, he might proceed, as often as he pleased, for breaches of the covenantⁱ.

In

In the covenant, which is the subject of our present enquiry, we see that the grantor covenants for himself, his heirs, executors, and administrators, not only to pay the annuity or rent-charge, when it shall become due, but also a proportionable part of it from the time which shall elapse between the last quarterly days of payment next preceding the decease of the grantor, to the time of his decease. This provision is very necessary, for if the grantor dies before the day of payment, then is both the annuity and rent-charge determined; and as the payment of the annuity is not due till the day fixed for that purpose, the grantee cannot avail himself of the remedies given by the statute of 32 H. 8. to recover against the executors of the tenant for life the *arrears* of the rent-charge; for in this case there are no arrears. As in this case the annuity is not in arrear, so the law will not make any apportionment of it in favour of the grantee; for the payment of rent to a stranger is similar to the applying of dividends arising upon money in the public funds payable to one for life; in which case, if the person to whom they are made payable should die before the day of payment, they cannot be apportioned: for Lord Hardwicke, in a case of that nature, expressly determined, that dividends were not like *interest* of money, which is due from day to day, but like *rent*, and therefore not to be apportioned^k. It seems, that if there be tenant for life, and he grants for him and his heirs a rent-charge, or annuity *in fee*, to be issuing out of the lands whereof he is tenant for

* Wilton v.
Harmen.
2 Vezey 672,
Amb. Rep. 279.

¹ 2 Co. 36. b.
Co. Litt. 349 a.

for life; if in this case the tenant for life dies, the *rent-charge* is entirely extinguished, but the *annuity* still continues¹.

= Vide
2 P. W. 502.
1 P. W. 392.

By the common law, if a tenant for life had made a lease for years, and had died before the rent was due, the rent was lost, both to the executors, and those in remainder or reversion^m, by which means the under-tenant was frequently exempted from paying any rent at all in return for the lands. To obviate so open an injustice, the statute 11 Geo. 2. c. 19. gives an action on the case to the executors and administrators of the tenant for life, to recover of the *under-tenants* such proportionable part as shall be incurred from the last day of payment, to the decease of the tenant for life. In the case of *Paget v. Gee*ⁿ, Lord Hardwicke said, that by an equitable construction the above statute extended to leases for years made by tenants in tail, not warranted by the statute 32 Hen. 8. c. 28.; and also to leases for years made by tenants for years determinable on their own lives. It is observable, that equity appor- tions maintenance money^o, and also interest on a mortgage^p.

= Vide
Ambl. Rep.
198.

^o 2 P. W. 502,
503.
^p 1 P. W. 176.

So far of the precedent now before us, as we have already stated, is a simple grant of a rent-charge at common law, with a power of distress, and entry, and a covenant to pay, &c. This grant may be to *uses*, the same as a feoffment to uses. Thus the grant may be to A. to the use of B. &c. which limitation of uses will be executed by the statute^q. What follows is a bargain and sale of the same lands to a trustee for years, for the better se- curing

^q *Supra*, 163 to
167.

five shillings (F) of lawful money of Great Britain, to the said A. Ashton in hand paid by the said C. Cary, at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged) he the said A. Ashton, at the request, and by the direction and appointment of the said B. Barton (testified by his being a party to, and sealing and delivering these presents) *hath* granted, bargained, sold (G), and demised, and by these presents *doth* grant, bargain, sell, and demise, unto the said C. Cary, his executors, administrators and assigns, *all* those the said messuages or tenements, lands, hereditaments, and premises hereinbefore particularly mentioned, and

Consideration
of the bargain
and sale.

Bargain and
sale.

curing the payment of the annuity or rent-charge. Hitherto we have seen, that the grantee has his remedy by distress, by writ of annuity, or by an action of covenant. By this demise, the trustee is empowered to demise, lease, or mortgage the lands, upon non-payment of the rent-charge.

(F) With respect to the consideration requisite to create a use in a bargain and sale, we shall have occasion to consider that subject in a subsequent page.

(G) The reason why a bargain and sale in this case is preferable to a common law lease for years, is, because the bargain and sale vests the possession in the bargainee without any actual entry, by force of the statute for transferring uses into possession; whereas an actual entry is necessary to vest the possession

and hereinbefore charged with the payment of the said annuity, or yearly rent, or sum of £.

Habendum.

together with all and singular the rights, members, and appurtenances thereto respectively belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, issues, and profits of all and singular the said several hereditaments and premisses, *to have and to hold* the said messuages or tenements, lands, hereditaments, and premisses, hereby granted and demised, or expressed and intended so to be, with the appurtenances, unto the said C. Cary, his executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during the term of ninety-nine years, from thence ensuing, and fully to be compleat and ended, *yielding and paying* therefore yearly and every year, during the continuation of this demise, unto him the said A. Ashton, the rent of one pepper-corn (H) (if the same shall be lawfully demanded) upon the *trusts* nevertheless, and

Reddendum.

¹ Vide

Co. Litt. 166. b.

session in a lessee at the common law¹. However, as the granting words are, *grant, bargain, sell, and demise*, the grantee may either take it by way of demise at common law, or bargain and sale².

² 2 Co. 35. b.

(H) This reservation of a pepper-corn is of itself sufficient to make the lands pass by way of use, that is, to turn the lease for years into a bargain and sale, and of course avoid an actual entry³.

³ Barker v. Keet.

1 Mod. 762.

2 Mod. 252,

253.

and to and for the ends, intents, and purposes, hereinafter expressed and declared of and concerning the same hereby demised premisses (that is to say) *upon trust*, in the first place, to permit and suffer the said A. Ashton and his assigns to enjoy, and receive and take the yearly income, rents, issues, and profits (I) of all the said hereby demised messuages or tenements, lands, hereditaments, and premisses, with the appurtenances, until default shall happen to be made of or in payment of the said annuity or yearly rent or sum of £. or some part thereof, at or on the days and times, and in the place and manner hereinbefore limited and appointed for the payment thereof; and upon this further *trust*, that in case the said annuity or yearly rent or sum of £. or any part thereof, shall happen to be behind or unpaid by the space of 30 days next over or after any of the said days or times of payment, whereon the same is hereinbefore limited and appointed; and ought to be paid as aforesaid, (being lawfully demanded) then, and so often as the said C. Cary, his executors,

(I) Here we may apply some observations made in a preceding part of this essay. This limitation of an estate to a trustee in trust to permit another to receive the profits, would, in case of a freehold, be executed in *cestuique trust* by virtue of the statute of uses ^{v.} But as a term of years does not come within that statute, the legal estate must continue in the trustee ^{w.}

^{v.} *Supra*, 154.

^{w.} *Supra*, 60, 61, 62.

tors, administrators, and assigns, shall from time to time, by and out of the rents, issues, and profits of the said messuages or tenements and premisses, or any part thereof, by *demising, leasing, and mortgaging* the same, or any part thereof, for all or any part of the said term hereby demised, or by such other ways or means as to him the said C. Cary, his executors, administrators, or assigns, shall seem meet, raise or levy such sum and sums of money as shall be sufficient to pay and satisfy the said annuity or yearly rent of £.

or so much thereof as shall from time to time happen to be in arrear and unpaid, with all such loss, costs, charges, damages, and expences whatsoever, as the said B. Barton, his executors, administrators, or assigns, or the said C. Cary, his executors, administrators, or assigns shall sustain, expend, or be put unto, for or by reason or means of the non-payment of the said annuity or yearly sum of £.

or any part thereof, at the days and times, and in the manner hereinbefore mentioned and appointed for payment of the same, or for or attending the performing the trusts hereby declared, and shall and do pay and apply the monies arising thereby in payment and satisfaction thereof accordingly, and shall and do pay to, or otherwise permit and suffer the said A. Ashton and his assigns to have, receive, and take the residue and overplus of the said rents, issues, and profits of the said messuages or tenements, lands, hereditaments, and premisses, after full payment and satisfaction of the said annuity or yearly sum of

of £. and all arrears thereof, and all such costs, charges, damages, and expences, as aforesaid; to and for his and their own use and benefit. *Provided always*, and it is hereby declared and agreed, that after the decease of the said A. Ashton, or full payment of the said annuity or yearly sum of £.

Proviso for determining the term.

and all arrears thereof, to the said B. Barton, his executors, administrators, and assigns, and payment of all such costs, charges, damages, and expences as aforesaid, the said demise hereby made, and the said term hereby granted, or so much thereof as shall not be disposed of under the trusts aforesaid, shall cease, determine, and be absolutely void.

And the said A. Ashton for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said B. Barton, his executors, administrators, and assigns, by these presents, in manner and form following, (that is to say) that he the said A. Ashton hath in himself good right, full power, and lawful and absolute authority to charge the said messuages or tenements, lands, hereditaments, and premises, and every part and parcel thereof, with the said payment of the said annuity, or yearly rent or sum of £.

Covenant that the grantor had a good right to charge the premises.

in manner aforesaid, and to demise the same messuages or tenements, lands, hereditaments, and premises respectively to the said C. Cary, his executors, administrators, and assigns, for and during the said term of 99 years, upon the trusts, and to and for the intents and purposes hereinbefore mentioned, expressed, and directed, of and concerning the same, and

That the pre-
misses shall al-
ways be open to
a distress;

and that they
are free from
prior incum-
brances.

according to the true intent and meaning of these presents (K). *And further*, that all and singular the premises hereby demised now are, and so shall from time to time, and at all times hereafter, during the continuance of the said term of 99 years, remain, continue, and be open to and sufficient for such distress and entries of the said B. Barton, his executors, administrators, and assigns, in case of non-payment to him or them of the said annuity or sum of £. in manner aforesaid; *and* that the said messuages or tenements, lands, hereditaments, and premises now are free and clear, and freely and clearly acquitted, exonerated, and discharged, and shall remain well and sufficiently saved harmless, and kept indemnified by the said A. Ashton, his heirs, executors, and administrators, of, from, and against all and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, annuities, rent-charges, former and other rents, and arrears of rents, dower, right and title of dower, uses, trusts, wills, intails, recognizances, judgments, extents, executions, forfeitures, and of, from, and against all and singular other estates, titles, troubles, liens, charges, and incumbrances whatsoever (*except here leases made, &c.*) had, made, done, committed, executed, occasioned, or suffered by the said A. Ashton, or any other person or persons

(K) On covenants of this kind vide 9. Co. 60. b. Cro. Jac. 304.

sons whomsoever (L). *And moreover, that* the said A. Assiton, and all and every other person or persons whomsoever, having, or lawfully or equitably claiming, or who shall or may lawfully or equitably claim any estate, right, title, trust, or interest whatsoever of, into, or out of the said messuages, lands, hereditaments, and premises hereinbefore mentioned, and hereby demised, or expressed or intended so to be, or any of them, or any part thereof, by, from, under, or in *trust* for him or them, shall and will

Covenant for further assurance.

X 2

from

(L) This covenant gives the grantee an action against the grantor, his heirs, executors, and administrators, in case the lands are insufficient for a distress, and in case of prior incumbrances, and therefore goes to the quiet enjoyment of the lands by the grantee. The words *grant* and *demise* in the bargain and sale also create an *implied* covenant that the trustee shall peaceably enjoy the lands under the term. I must refer to another place for a few observations on the manner in which an *implied* covenant is qualified or restrained by an *express* one. I shall only observe here, that if a tenant for life leases for years by the words *grant* and *demise*, this implied covenant only extends to the lessor himself, and not to his personal representatives after his death: but if A. seised in fee makes a lease for years, with such an implied covenant, and dies, and the heir *ousts* the lessee, he shall have an action of covenant against the heir on account of the privity.

Post.

An implied covenant determines with the estate. Vide Cro. Eliz. 157. Moor, 74.

F. N. B. 342. Note C. Dyer, 257. a. b.

from time to time, and at all times during the continuance of the life (M) of him the said A. Ashton, upon every reasonable request of the said B. Barton, his executors, administrators, or assigns, but at the proper costs and charges in the law of the said A. Ashton, (N) make, do, acknowledge, levy, suffer, and execute, or cause or procure to be made, done, acknowledged, levied, suffered, and executed all and every such further

For such acts as do or do not amount to a breach of this covenant against prior incumbrances, vide *Harrington and Rydear's case*, 1 Leon. 92. and the case there cited of a rent-charge. Vide 1 Keb. 427, and also Sav. 74, 75, concerning the exposition of the word *incumbrance*, also Anon. Dyer 139. a. Ander. 236: 2 Vern. 45.

(M) Concerning the time of making, and request to make further assurances, vide *Wentworth v. Wentworth*, Syles 242. 1 Roll. ab. 441. and *Nash v. Aston*, T. Jones, 195.

(N) It seems that without this provision, the further assurance must be at the costs and charges of him to whose use the conveyance is made*. And in *Heron v. Treynce*, it is said by Holt, C. J. that in a covenant to make further assurance at the costs of B. notice of the *kind* of assurance must be given to B. before he ought to tender costs; though secus if the covenant was to make a particular conveyance.

* 1 Bull. 90:
Goldney v. Cur-
tise.

* 2 L. Raym.

750.

Vide *Browl.*

70.

ther (O) and other lawful and reasonable (P) acts, deeds, and things, devices, conveyances, and assurances in the law whatsoever, for the better, more perfect, and absolute granting and securing the said annuity or yearly rent-charge of £. . . to the said B. Barton, his executors, administrators, and assigns, by and out of the said messuages or tenements, lands, hereditaments, and premises, and every part thereof, for and during the continuance of the natural life of him the said A. Ashton, and also for the more effectual granting, demising, and assuring the same hereditaments and premises unto the said C. Cary, his executors, administrators, and assigns, for all the then remainder of the said term of 99 years, upon the trusts hereinbefore directed thereof, as by the said B. Barton, his executors, administrators, or assigns, or his or their counsel learned in the law (Q) shall be devised, or advised, and required. In witness, &c.

It

(O) Concerning what shall be a *further* assurance, vide 2 Leon. 130. Ca. 172. 1 Bulf. 90. 2 Bulf. 317. also Earl of Clenricard v. Viscount Lisle, Hob. 273. 275, 276.

(P) As to what shall be a *reasonable* assurance, vide Pet v. Callys, 1 Leon. 304. Atkins v. Uton, 1 L. Raym. 36.

(Q) It seems that if the party or grantee be himself a counsel, he cannot advise as to the assurance. Vide Rosewel's case, 5 Co. 19. b. As to the advice of counsel, see 1 Roll. ab. 440, 441.

Since the case of *Irham v. Child* the clause of *repurchase* has become usual in deeds of annuity ; as it was determined in that case, that such clause did not make the contract *usurious* ; and without it, parol evidence cannot be admitted to prove that there was an agreement to redeem or repurchase.
 1 Bro. Cha. Rep. 91. Vide *Supra*.

It must be observed, that where a rent-charge is granted by way of annuity, or in order to secure the payment of a sum of money, then it is usual for the grantee to take a bond with a warrant of attorney to confess judgment, which should be recited in the annuity deed, and the intent of taking them declared. In deeds of this kind, there should also be a clause of *re-purchase*.

BARGAIN AND SALE.

WE frequently find it said in the books, that the conveyance by bargain and sale derives its effect from the statute of uses. This expression would naturally lead a person to imagine, that this conveyance was introduced in consequence of the passing of that statute ^a. But the fact is, that this species of assurance was in use long before the statute of uses was ever thought of ^b. That statute, it is true, has given it greater efficacy than it possessed when uses remained at the common law: but it is the operation which the statute has had upon uses themselves that has given birth to the expression just alluded to, and that has rendered the conveyance by bargain and sale more efficacious than it originally was.

^a Vide 1 Ba. ab; 273.

^b Vide 1 Co. 87. b. 100. b. 8 Co. 94. a. Co. Litt. 271. b. 1 Burr. 95.

By the common law no lands could be transferred from one man to another but by the solemn and public manner of livery of seisin. This simple mode of conveyancing
by

by feoffment and livery of seisin continued in full practice till the introduction of uses ; since which period feoffments have gradually fallen into disuse, and at present are but very seldom resorted to. The inconveniences attending an actual entry, and the many nice laws relating to the manner of giving and receiving the possession, were possibly among the most urgent reasons, which induced men to depart from the notoriety of public investiture, and to adopt a mode of conveyance better suited to their own ideas of accommodation and expedition. The doctrine of uses afforded a very ample opportunity to effectuate a departure from this antient plan of conveyance. The conveyance by bargain and sale owed its origin to an equitable construction of the court of chancery, which held, that a valuable consideration, though not absolutely necessary to the conveyance of the *land* by feoffment and livery, yet was alone capable of raising a *use*. Therefore, if a man for a valuable consideration bargained and sold his lands, now, though the lands themselves could not in this case pass, for want of livery of seisin, yet that court of equity thought it to be against conscience that a man should pay a valuable consideration for lands, and on account of the omission of a legal ceremony he should have nothing in return for his bargain ; therefore it held, that he should have the *use* of the lands, which was nearly tantamount to having the lands themselves. By this construction, immediately after the bargain and sale was completed, the bargainor became

became seised to the use of the bargainee, and the bargainee himself became in every respect *cestuique use*. It is for these reasons, that we must account for the definition usually given of this assurance, by which it is termed a *real contract* for a valuable consideration^c; thereby not allowing it the name of an *absolute conveyance*, but only giving it the appellation of a *contract*, by virtue of which *cestuique use* might compell the bargainor to execute a legal and absolute assurance. As then by a bargain and sale of lands before the statute, nothing but an equitable interest passed to the grantee, it was placing the bargainor and bargainee nearly in the situation of a feoffee, and *cestuique use*.

It is observable, that the books^d, when they speak of bargains and sales, do not mention them as being expressly made of the *use* of the lands, but as absolute sales of the *lands* themselves (without noticing the *use*); which sales of the lands only for a *valuable consideration* were sufficient to carry the *use* to the bargainee. Indeed, in the present forms of bargains and sales, we see that the *land* and not the *use* is sold: therefore, though it has become usual to *declare* the *use* to the bargainee in the *habendum*, after a previous bargain and sale of the *lands* in the premises, yet this declaration of the *use* is not altogether necessary; for it is the *consideration* which directs the *use* to the bargainee, and the parties could not declare it to any other person, even if they were inclined so to do^e. Therefore, when we meet with an assertion, that

^c 2 Inst. 672.

^d 1 Co. 87. b.
100. b.
8 Co. 94. a.
Co Litt. 271. b.
Moor, 34. pl.
113.

^e Bro. feoff. al.
uses. pl. 40.
B. N. C. pl. 60.
Dyer 155. a.

that it is absolutely necessary to declare the use to the bargainee^f, we must understand it as meaning that the use cannot be declared to any other person than the bargainee, but that without any such declaration the use would, on account of the consideration, vest in the bargainee^g.

^g Vide West.
symb. part 1.
f. 359.
Convey. Light.
142. 165.
edit. 1653.

It follows from the above history of a bargain and sale, before the statute of uses, that no person could bargain and sell his land, who had not the *use* as well as *possession* in him at the time of the sale. Therefore, if a feoffee to uses had bargained and sold to one who had no notice, yet no use would have passed to the bargainee, because the feoffee or bargainor had no use himself, and there could not be two uses of the same land^h. On the other hand, if *certain use*, before the statute of uses, and after the statute of 1 Rich. 3. had conveyed the *lands* by the words *bargain and sell*, nothing but the *use* would have passed^a.

^h Co. Litt. 271. b.

^a Moor, 34. pl.
113.
Burr. 95.

It is scarce necessary to observe, that the statute of uses has given a greater force to the conveyance by bargain and sale, than it originally had. Immediately that the use, according to the original operation of this conveyance, is vested in the bargainee, the statute annexes the possession; so that a bargain and sale is at this day a complete conveyance, which entirely transfers both the use and possession from the bargainor to the bargainee, and is not in effect what it formerly was, viz. a *contract*, for the performance of which the bargainee was obliged to seek

seek relief in equity. The use, however, must still vest in the bargainee before the possession can be executed in him.

The *nature* of the estate of the bargainee *since* the statute is the same as it was *before*.

The bargainee is still but a *cestuique use*; and though he has a *legal* instead of a *fiduciary* estate since the statute, yet that legal estate is made such by force of the statute of uses, and not according to the rules of the common law. Upon this principle it has been held, and is indeed now established, that no use can be limited to arise out of the estate of the bargainee to a third person, for that would be to limit a use *to arise* upon a use. Therefore, if A. bargains and sells in fee to C. to the use of A. (the bargainer) or any other person, for life, or in fee, this limitation of the use is voidⁱ. But though this de-

claration of the use is void as a *use*, yet it has been a question, whether it would not be supported as a *trust* in chancery^k. However, according to the very liberal principles, which guide the courts with respect to trusts, there is no doubt, I apprehend, but that such uses could be deemed *trusts*^l.

As a use upon a bargain and sale cannot be limited to any other person than the bargainee, so neither will the estate of the bargainee support a *springing* or *future* use. Every future or springing use should have a seisin at the common law, out of which it is to be served, when it comes *in esse*. It was before observed^m, that if a feoffment had been made to A. and his heirs, to the use of B. and his heirs, until C. paid a certain sum,

and

ⁱ Dy. 155. a.

^j Ander. 37.

pl. 16.

^k Leon. 148.

^l Cha. Ca. 114.

115.

^m Vide Gilb.

uses, 194.

ⁿ Bro. feoff. a1.

uses, pl. 30.

B. N. C. 423.

and then to the use of C. in fee, or that then A. should stand seised to the use of C. and his heirs; or if a feoffment had been made to A. in fee, to the *use of himself* in fee, but if C. paid so much then to the use of C. in fee; in either case upon the payment of the money the use would shift to C. and be executed by the statute. For here in both instances there is a seisin transferred to A. which may serve any uses declared by the parties. Though the whole of the use in the first case is executed in B. by the statute, yet when the money is paid, it is divested out of him, and it then shifts to and is executed in C. the second *cestuique use*. Upon this momentary change, the use to C. is served out of the original seisin, or livery given to A.^a The limitation of the use in the second instance to A. *himself* does not alter the principles of the case: for it being declared to A. (who is also feoffee) he is in by the *common law*, and not by the statute: therefore, when C. pays the money, the use shifts from A. to C.; but in this shifting it is not served out of the seisin of A. as being *cestuique use*, but as being a *feoffee* to uses, or as having the possession by the common law. This is a very necessary construction; for if the future, or springing use, was limited to take effect out of the estate of *cestuique use*, it would be nothing else in reality than limiting a use to arise out of a use, which is clearly against law. This distinction is taken by the judges in Chudleigh's case. If, say they^a, A. enfeoffs B. to the use of C. in fee, with a proviso, that if D. pays C. £.100, then C. shall stand seised to the use

^a Vide
1 Co. 133. b.

^a 1 Co. 137. a.

use of D. and his heirs, this limitation of the use is utterly void: for the future use ought to be raised out of the estate of the *feoffee*, and not out of that of *cestuique use*. This brings the case of a bargain and sale exactly in point. The *bargainee* is in fact but a *cestuique use*; therefore, if A. bargains and sells to B. in fee, provided if C. pays so much money, then B. shall stand seised to the use of C. in fee, this limitation of the use is void, because it is to take effect out of the estate of *cestuique use* ^{p.}

• There is a case in Moor⁹, which at first view may seem to be contrary to this doctrine. A. bargained and sold his lands in fee absolutely, and in the same deed of bargain and sale the bargainee *covenanted and granted*, that if A. or his heirs paid such a sum by such a day, then the bargainee and his heirs would *stand seised to the use* of the bargainor and his heirs. Before the day of payment the money was *tendered*, and the bargainee refused to accept it: and it was held, that upon *payment* the *use* would have *changed*, though not upon a mere *tender*. However, with respect to this case we must, in the first place, observe, that it was the case of a *mortgage*, and in all probability there were words of *condition* annexed to this covenant; in which case the bargainor would have entered by way of a condition broken, and not by way of limitation of a use. Indeed there are precedents, where a similar covenant, with words of re-entry annexed, has been inserted in a bargain and sale, in order to create a condition¹. But supposing this not to be a

• Vide Leon. 7.
Stoneley and
Bracebridge's
case.

• Moor, 35. pl.
115.
Dalia. 38. S. C.
Vide Dyer, 361.
a. pl. 9.

• Vide West's
Sym. pl. 1.
l. 284.

condition, yet a use might be well raised on the covenant of the *bargainee*, for when he covenanted to stand seised to the use of the bargainor, the use would not arise to the bargainor, as a limitation of that use which he had just parted with, for that would be a use upon a use: but the use would arise to the bargainor by virtue of the *covenant*, and not by way of limitation of a use upon the bargain and sale. The covenant in that case was, as it were, independent of and uninfluenced by the particular operation of the bargain and sale. After an absolute bargain and sale in fee, the bargainee may limit what uses he pleases upon his estate by a different, or subsequent conveyance: for the doctrine that future uses cannot be limited to arise out of the estate of *cestuique use*, can only hold good when those future or springing uses make a part of, and are limitations operating by the same bargain and sale. Surely if a man bargains and sells in fee for a valuable consideration, the bargainee may convey those lands to another by a bargain and sale, though he is by the first original bargain and sale a *cestuique use*. Therefore, a *cestuique use*, after the statute 1 Rich. 3. and before the 27 H. 8. might have transferred his *use* without conveying the lands themselves^a: for though a limitation of a use to arise out of his estate by the first conveyance would have been void, yet when the use was vested in him, he might dispose of it, as he thought proper; and of course the possession, since the statute, would be executed according to the disposition of the use. Now, though the covenant in this case

^a Moor, 34. pl.
113.

case is contained in the bargain and sale, and upon that account both may be held to form but one conveyance, yet they have the effect of two^x: therefore, it is said, that the same consideration is as necessary to create a use by way of *covenant* on a bargain and sale, as on the bargain and sale itself^r; which circumstance proves, that it is not a *limitation* of a use arising out of the estate of the bargainee, because if it was, then the first consideration (supposing a use could be *limited* to arise out of the estate of the bargainee) would be sufficient for that purpose: but as the use arose by way of *covenant* by the bargainee, a fresh consideration was necessary.

To illustrate still further this doctrine, viz. that neither a present nor a future use can be limited to arise out of the estate of the bargainee, when the limitation of the use derives its efficacy from, and constitutes a part of, the original *contract*, or bargain and sale, we need only have recourse to a very known case. If a feoffment be made to A. in fee, to the use of W. for life, remainder to the use of B. in fee, with a power for W. to make leases for three lives. Here W. has but an estate for life, and if he makes the leases, they will take effect by way of limitation of a use out of the original seisin of A.^s But if there be a bargain and sale to one for life (by which the reversion in fee is in the bargainor) there cannot be a power annexed to the bargain and sale for the bargainee to make leases, so as to take effect by way of limitation of a use out of the estate of the bargainee, for that would be limiting a use upon a use: neither

can

^x 2 Roll. ab.
786. (M)

^r Vide
Gilb. uses, 217.
220.
Mildmay's case.
1 Co. 175. a.
also see 1 Stra.
584. Anon.
Vide B. N. C.
470.
1 Leon. 25.

^s 1 Co. 134. a.
Poph. 81.
8 Co. 71. a.

can such use arise out of the estate of the bargainor, for want of a consideration paid by the lessee at the time of the bargain and sale.¹

¹ Poph. 81.

It may here be said, that as the use limited to the *bargainee* is served out of the seisin of the *bargainor*, so the same seisin (like that of a feoffee) which serves the use to the bargainee, may equally as well serve a springing, or future use to a third person. But with respect to that, I presume, that after a bargain and sale *in fee*, there cannot be a *possibility of seisin* (which feoffees are supposed to have upon the limitation of secondary uses) left in the bargainor to feed any future uses, in abridgement of the *fee* transferred to the bargainee. If then there can be no possibility of seisin remaining in him, or admitting that such a possibility of seisin did remain in him, yet should he make an actual entry to vest those future uses, when they come *in esse* (which entry by feoffees to uses would, in a similar case, be the most certain way to vest them) such entry will be ineffectual for that purpose.

With respect to the first point, it is the very nature of a bargain and sale, which is always supposed to be made for a valuable consideration, to transfer the *use*, and of course the *possession* since the statute, absolutely from the bargainor upon a bargain and sale *in fee*: therefore, the only difference between this conveyance, and a feoffment, is, that the latter first conveys the *possession*, and then the *use*: but both of them, since the statute, when used by a person seised *in fee*, entirely convey

vey the use and possession from the bargainor and feoffor. The situation then of the bargainor is in this respect rather similar to that of the feoffor; and though the use in the case of a bargain and sale is served out of the seisin of the bargainor since the statute, whilst on a feoffment it is served out of the possession of the feoffee, yet the seisin, which the bargainor has to serve the use to the bargainee, differs materially from that which a feoffee is supposed to have. The seisin of the *feoffee* is such as will serve a use declared to himself, to the feoffor, or a stranger, or to all of them: but the seisin of the *bargainor* can only serve the use, which is bargained and sold to the bargainee. After the limitation of a future, or contingent use upon a feoffment, there is a *possibility of seisin* remaining in the feoffees to serve those future uses, when they come *in esse*; because, as the uses on a feoffment are guided chiefly by the declaration and intent of the parties, that intent could not be effectuated, unless there was a seisin in the feoffees to feed the uses upon their shifting. But as the use on a bargain and sale can only be vested in the bargainee; and as such use is for a valuable consideration bargained and sold to him, it seems that there can be no possible seisin left in the bargainor to serve any uses in abridgment of that previously conveyed to the bargainee.

v. 1 Leon. 148.
Moor. 46.

v. Chudleigh's
case.
1 Co. 129. a.

If then there can be no possibility of seisin in the bargainor, after a bargain and sale *in fee*, to feed any future or contingent uses, the only way that the use sold to the bargainee can be avoided or abridged, is to annex a

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condition

condition of entry to the bargain and sale upon the happening of a contingent event. Thus, suppose A. bargains and sells to B. in fee, but if C. pays such a sum of money at such a time, then the use to B. shall cease, and it shall be lawful for A. to re-enter and stand seised to the use of C. In this case it might be imagined, that upon the entry of A. the future use to C. would vest; but this conclusion has been expressly denied. A. bargained and sold * lands to B.; but upon payment of a certain sum there was a condition that A. should re-enter, and stand seised to the use of himself and heirs, until he attempted to alien without the assent of B. *and then to the use of B. and his heirs.* A fine was levied to those uses: A. paid the money, and entered; and afterwards aliened the lands without the assent of B.: it was held by the Lord Chancellor Egerton, that no use should arise to B. after the alienation of A. The principal reason given for this determination was, that the *bargainor*, entering for a condition broken, ought to be in of the *old use*, and could not stand seised to any other than that old use. This case places the *bargainor* in exactly the same situation as a *feoffor*, instead of a *feoffee*: for it has been said, that if A. enfeoffs B. to the use of B. and his heirs, upon condition that if B. does such a thing, then A. may re-enter, and stand seised to the use of C.; here, upon the entry of A. no use will arise to C. Now it is very certain, that if feoffees enter to vest a future use, though by such entry they gain their *former* estate and seisin *, yet the use will immediately

* Holloway v. Pollard.
Moor, 761. pl. 1054.

* 1 Leon. 269.

* 1 Co. 128. a.

diately be vested in *cestuique* use upon their entry. But we are here to notice, that when *feoffees* enter to vest a future use, they do not enter as for a condition broken, because, strictly speaking, a condition can only be reserved to the *feoffor*^a, &c. However, I conceive, that the entry of the *feoffees* to avoid one use, and vest another, has the same effect, as to the regaining of their former estate, as the entry of the *feoffor* or *bargainor*, as to their being in of their old use and estate. But as the *former* estate and *seisin* of the *feoffees* were purposely created to serve the future, as well as present uses; and as the *former* and *old* estate of the *bargainor* was *not* created for the purpose of serving such future uses, there can be no inconsistency in allowing the future use to vest in the one instance, and denying it in the other. Therefore, even supposing a possibility of *seisin* could remain in the *bargainor* after a bargain and sale in fee, yet if he were to enter, he would be in of his old use and estate, and then, according to the case of *Holloway v. Pollard*, the future use could never vest. It is true, that it is the received opinion^b, that a *right* of entry in the *feoffees* (without an *actual* entry) will alone vest the future use in *cestuique* use; but that construction has taken place, because, if they really did enter, it would be the *sure* way of effectuating that purpose^c. It may then be reasonably inferred, that if an *actual* entry by the *bargainor* could not vest a future use, his *right* of entry alone could not be sufficient.

From these observations it appears, that after a bargain and sale *in fee* there cannot

^a Litt. l. 349.^b 1 Co. 181. b.
^c Vent. 189.^c Brb. feoff. al.
uses; pl. 30.
B. N. C. 423.

possibly be any future or springing use *limited* to arise out of *the estate of the bargainee*: and that it would be extremely hazardous to limit such a future or springing use to take effect out of *the estate of the bargainor*. But here we are to observe a distinction between a limitation of a future use out of the estate of the bargainor after a bargain and sale *in fee*, and where a contingent use, or remainder is limited out of the seisin of the bargainor after a previous bargain and sale *for life* only. Thus if a man bargains and sells to one *for life*, remainder to the first son of the bargainee (which first son is unborn at the time of the conveyance) this is a good limitation of the use to the first son to take effect out of the estate of the bargainor^d. For in this case the possession of the bargainor was only executed in the bargainee *for life*, so that the reversion in fee remained in him, out of which he might limit the uses to the first son of the bargainee. The consideration paid by the bargainee might well extend to the uses limited to his son^e.

^d Vide Gilb. uses, 197, 198.

^e 2 Roll. ab. 784. pl. 6, 7.

As I have so frequently hinted at the necessity of a supposed possibility of seisin remaining in the feoffees, conusees, &c. in order to serve a future or *springing* use, when it comes *in esse*, it may be proper here to explain the reasons for recurring to this construction. Every use should have a *seisin* out of which it may be fed or served: now if a feoffment be made, a fine levied, a recovery suffered, or a conveyance by lease and release made to A. to the use of B. *in fee*, but if C. does such a thing, then to C. *in fee*; here, as the old use

in

the fee is first limited to B., the statute of uses, until C. performs the condition, can only execute the use to B.; because in the first place no use is in fact limited to C. till that time; and secondly, until the use to B. *ceases*, no use to C. can be executed by the statute, for there cannot be *two* uses of the same land existing at the same time^a. Now upon the performance of the condition by C. and cessure of the use to B. as there must be a seisin somewhere to serve this shifting use upon its momentary change, the question will be, out of whose seisin is it to be served? it cannot be served out of the seisin of B., because he is *cestuique use*: neither can it be served out of the seisin of the *feoffor*, &c. because the livery, &c. entirely divested him of all possession whatever^b: in order then to effectuate the purpose of the conveyance, the shifting use, when it comes *in esse*, must be served out of the original livery or seisin transferred to A.^c which seisin, as it was at first wholly executed in B. by the statute, and as there was but a *possibility*, that it should ever be divested from him, and return to A. to serve the secondary use to C. it was from thence denominated a mere *possibility of seisin*.

Brook^d tells us, that it would be proper in a case of this kind to enter in the name of the feoffee, in order to vest the shifting use: it, however, appears that the *right of entry* in him will alone support it^e.

So it seems, that upon the limitation of a *contingent use* after a previous limitation of an estate for life, there must be a possibility of seisin

^a Co. Litt. 271. b

^b Vide
¹ Leon. 269.

^c Vide
¹ Co. 133. b.

^d Bro. feoff. al.
uses, pl. 30.

^e 1 Co. 101. b.
¹ Vent. 189.

See this case at
large, *supra*,
222, 223.

seisin in the feoffees, &c. to serve this contingent use, when it comes *in esse*. Thus the point in Chudleigh's case was, a feoffment was made to J. S. in fee, to the use of A. for life, remainder to his first son, &c. remainder to B. in fee; and the question was, whether any and what seisin remained in J. S. to serve the uses limited to the sons of A., when those uses should come *in esse*? We have already seen, that in this very case, it was agreed, that to the execution of a use by the statute, there were four necessary preliminaries, viz. a person *seised* to the use at the time of the execution of it—a *cestuique use in esse*—a use in possession, reversion, or remainder—and the estate out of which the uses should arise ought to vest in *cestuique use*. From these rules there were two opinions given in the debate of Chudleigh's case. Some thought that there was an *actual* estate in remainder vested in J. S. to serve the contingent uses, when they arose; whilst others were of opinion, that no *part* of the original seisin remained in J. S. but that the whole possession was executed in A. and B., and that the contingent uses, when they should arise, must be served out of the estate *formerly* in the feoffees. But both of these opinions were erroneous; for with regard to the first, as the use was limited to A. for life, remainder to B. in fee, this was commensurate to the whole fee, and did not admit of any intervening estate, till those limited to the sons should arise; besides, if there was a vested remainder in J. S. he might enter for a forfeiture, and punish for waste, &c. and it was clear, that the parties intended

intended him no such benefit. With respect to the second system, it was clearly against the words, and meaning of the statute, for that requires J. S. to be seised at *the time of the execution* of the use; if therefore the whole estate of J. S. was divested out of him, the contingent uses could not be served out of the *former* estate of J. S. for the *statute* not only requires him to be seised at the time of the execution of the use, but it appears to be the very essence and nature of a use, that there should be a seisin somewhere, out of which it is to be served; if indeed the whole seisin was taken from J. S., then if it is to be vested at all, it must be served out of the estates of A. and B. which would be to limit a use out of a use. Upon the whole, the majority of the judges in this case (among whom was Lord Coke) were of opinion, and decided accordingly, that J. S. neither had an actual vested estate in remainder to serve the contingent uses when they arose, and in the mean time to preserve them, nor was the *whole* of the original seisin taken from J. S.; but that the possession was executed in the same manner as the use was limited: that the use to A. for life, and the remainder to B. in fee, were indeed executed, but subject to the possibility of A.'s having sons, and their becoming entitled to the use, and of course the possession. Thus during the suspense of the contingent use, the feoffee (J. S.) had a possibility of seisin unaffected by the statute, because there was no use *in esse* (which the statute requires) to which it could be executed. When the use came *in esse* the feoffee

Vide
Butl. note under
fol. 273. b.
to Co. Litt.

feoffee would be entitled to the possession at common law, which possession would be instantaneously executed in cestuique use.

We will now return to the subject of bargains and sales.

It is an established rule, that a conveyance, which does not operate by force of livery of seisin, or what is equivalent to it, such as the writ of *habere facias seisinam* on a judgment in a recovery or fine, or a release with warranty, cannot work a discontinuance of lands¹. A discontinuance is properly where a tenant in tail, or one seized *in autre droit*, makes such an alienation as takes away the entry of the issue in tail, or the heir, or successor, or those in reversion or remainder, and leaves them to their remedy by action². The conveyances by feoffment, fine, and recovery, operate by way of transmutation of the possession, and the particular solemnity attending the execution of them was deemed sufficient to disturb the original seisin, and to work a discontinuance. But a bargain and sale did not possess any of these qualities. Instead of operating by way of transmutation of possession, it previously passed the use, thereby, as it were, operating by way of *transmutation of the use*. Neither was there any solemnity attending the execution of it; for it was perfected by a transfer of the use, without any public or other delivery of the possession. Therefore, if a tenant in tail made a bargain and sale *in fee*, as the use in this case first passed to the bargainee, the possession was executed in him by the statute of uses in the same manner, as he had the

¹Co. Litt. 330. a.

²Butl. note 1.

Co. Litt. 325. a.

³Co. Litt. 325. a.

the use. Now, as uses were under the direction of the chancery, that court limited the use to the bargainee in the case just put, according to the extent of its limitation to the bargainor before the bargain and sale. By this construction there could be no disturbing of the estates of the issue in tail, or of those in reversion or remainder; of course there could be no discontinuance produced^h.

^h 10 Co. 96. a.

But whether after a bargain and sale in fee by a tenant in tail, the bargainee has only an estate of freehold during *the life* of the tenant in tail, descendible to the heir, as *special occupant* (in which case the bargainee would be punishable for wasteⁱ, his wife would not be endowed, nor would his heir have his age^k); or whether, after the bargain and sale in fee, the bargainee has an estate of *inheritance* determinable by the entry of the issue in tail (in which case he would be dispunishable for waste^l, and his wife would be entitled to dower^m) has been a point rather disputed. The case of *Took v. Glascock*ⁿ seems to favour the former construction; for it is there said to be resolved, that the bargainee of a tenant in tail has only an estate *descendible* during the *life* of the bargainor or tenant in tail, according to Litt. f. 696; which estate could not be devised by the statutes 32 H. 8. c. 1. and 34 & 35 H. 8. c. 5. which allow of devises of estates of *inheritance* in fee simple; whereas the estate of the bargainee was only descendible to his heir as *special occupant*. But by *Seymour's case*^o it appears, that the bargainee in such a case shall have an estate

ⁱ Co. Litt. 41. b.

^k 44. b.

^l Dyer, 321. b.

^m 22.

ⁿ 10 Co. 98. a.

^o Plowd. 557.

^p Co. 84. cites

24 E. 3. 28. b.

^q 1 Saund. 269.

^r 10 Co. 95. b.

P. 2 Salk. 619.
 Marsh v. Clark.

estate of *inheritance* during the life of the tenant in tail, out of which estate his wife shall be endowed. So Holt, C. J. in consequence of the determination in Seymour's case, laid it down as a rule^p, that if a tenant in tail conveys to one and his heirs by a bargain and sale, or covenant to stand seised, the bargainee or covenantee has a *base fee* not determined, nor determinable till the entry of the issue. He denied the case of Took v. Glascock to be law, and also Litt. f. 612. if taken literally. He also added, that if tenant in tail bargains and sells in fee, the estate tail is not in abeyance, but in the bargainee: but if a tenant in tail bargains and sells to one for the *life* of the bargainor, *remainder* over in fee, this remainder is absolutely void in its creation, because it is to take effect after the death of the tenant in tail: for the grant of the remainder is like a lease made by a tenant in tail to commence after his death, which is clearly void *ab initio*; but a lease made to commence during the life of the tenant in tail is only *voidable* by the issue.

¶ 10 Co. 96. 2. In Seymour's case it was resolved^q, that if after the bargain and sale tenant in tail levies a fine to the bargainee, it corroborates the estate of the bargainee; that is, it does not displace or discontinue the estates in remainder, but it gives the bargainee an estate determinable upon the death of the tenant in tail *without issue*, instead of an estate determinable upon the death of the tenant in tail himself. But if a fine is levied *before* the bargain and sale, then it bars the issue, and
 works

works a discontinuance of the estates in remainder^r. So, if *after* the bargain and sale^r 10 Co. 56. 4. the bargainee levies a fine with proclamations, yet the issue in tail have five years after the death of the tenant in tail to make their claim^s. If tenant in tail bargains and sells^r Cro. Eliza. 896. in fee, and the bargainee devises his estate Pennyton v. Lyster. and dies, and then the bargainor levies a fine to a stranger; now this fine does not make the devise good, but corroborates the estate of the heir of the bargainee, and makes his estate a *base fee*^t.

As a bargain and sale is nothing but the disposition of the use, the court of chancery, which had the sole direction of uses, held that upon every bargain and sale such an estate only passed in the use, as the bargainor might *lawfully* transfer^v. Upon this account a bargain and sale can work no forfeiture. Therefore, if a tenant for life bargains and sells his estate *in fee*, this is no forfeiture of his life estate; for upon the bargain and sale the estate in the use only passed during the life of the bargainor, and of course the statute now executes the possession according to the estate, which the bargainee has in the use^w.

Upon this principle, that a bargain and sale can only pass what the bargainor lawfully might part with, it is now admitted, that this *equitable* conveyance cannot, when made by a tenant for life, destroy or disturb any contingent estates limited after the estate for life of the bargainour. Therefore, if there be tenant for life, with a *contingent* remainder over, and the tenant for life bargains

^r 10 Co. 56. 4.
^s Cro. Eliza. 896.
^t Pennyton v. Lyster.

^t 1 Saund. 261.

^v Vide 3 WILK. 245.

^w Gifb. uses, 102.

gains and sells the lands *in fee*, this does not destroy the remainder, because by the conveyance an estate only passed during the life of the *bargainor* ^x.

^x 3 Will. 245.
Hard. 416.

As soon as the *use* is by this conveyance vested in the bargainee, the *possession* is executed in him by force of the statute of uses; so that he has a *legal* estate without any actual entry ^y. It will be necessary to see in what respects the possession, so acquired by the operation of the statute, has the quality of a *possession* obtained by an actual entry.

^y Cro. Jac. 604.

By virtue of this possession the bargainee of a reversion may avow for the rent, or bring an action for waste ^z: but it seems he cannot take any advantage for the non-payment of rent without giving notice of the bargain and sale ^a.

^z 6 Co. 63. a.

It is said that a bargainee can never

^a Cro. Jac. 146.
476.

^b 5 Co. 113. b.

^c 1 Co. 125. a.

^d 2 Roll. ab.

786, 787. pl. 1.

vouch by force of any warranty annexed to the estate of the land ^b, but that he may re but upon a bargain and sale ^c. A bargainee

for years has such a possession by force of the statute, as enables him to receive a release ^d:

^d Cro. Jac. 604.

and if a man bargains and sells the reversion for years after an estate for years, the grantee of the reversion has an estate capable of receiving a release without attornment ^e. A bargainee may make a good tenant to the

^e *Ibid.*

præcipe in order to suffer a common recovery even before inrollment ^f: but he cannot bring an action of *trespass* without an actual entry ^g.

^f 1 Vent. 360.

^g Cro. Jac. 604.

1 Vent. 361.

As the possession passes instantaneously with the use by a bargain and sale, it has been held, that a reservation of rent on this conveyance is good, because it is the same thing as reserving the rent out of the land itself;

itself: but before the statute of uses, when the use and possession were separate, a rent could not be reserved on a bargain and sale ^h.

^h 2 Co. 54. d.

After the statute 27 H. 8. c. 10. the use and possession passed by the mere delivery of the deed of bargain and sale; so that those inconveniences attending the secret transfers of property, which that statute meant to remedy, in a great measure still remained. Therefore, to re-establish in some degree the notoriety of conveyancing, the statute of enrolments was made. By the statute 27 H. 8. c. 16. §. 1. it is enacted, that no lands or hereditaments shall pass, whereby any estate of inheritance or freehold shall be made, or any use thereof, by reason of any bargain and sale, except the bargain and sale be made by *writing, indented, and enrolled* in one of the king's courts of record at Westminster, or within the county where the lands lie, or before the *custos rotulorum*, and two justices of the peace, and the clerk of the peace of the county, or two of them, whereof the clerk of the peace be one; and the same enrolment to be made within six months after the date of the writings.

By this statute a bargain and sale of lands of inheritance is void, *except* it be enrolled within six months after the date thereof. Before this statute a bargain and sale by virtue of the doctrine of uses, and the operation of the statute 27 H. 8. c. 10. took effect immediately from the delivery of the deed. The statute of enrolments did not intend to set aside or abolish any particular force which it

it formerly had : therefore, when it is enrolled it raises the use from the delivery of the deed, and of course the statute of uses executes the possession at the time, when the uses are raised ⁱ. The enrolment has a *relation* to the *delivery* of the deed for the advantage of the *bargainee*, not only to avoid all incumbrances, but also all mesne conveyances by the *bargainor* to a third person made between the delivery of the deed and the enrolment ^k. Therefore, if A. bargains and sells to B. and before any enrolment A. bargains and sells the same lands to C. and the second deed is enrolled first, but within the *six months* the first deed is enrolled; in this case the first deed, though enrolled after the second, shall stand ^l. So if A. had there levied a *fine* to C. yet the bargain and sale to B. would have avoided it ^m. Upon the same principle, if a man bargains and sells his lands, and then acknowledges a statute, or suffers judgment, after which the deed is enrolled, it shall have relation to the delivery, and so avoid the mesne incumbrance ⁿ. In the case of *Beltingham v. Alsop* ^o, A. bargained and sold lands to B. and the *bargainee*, before any enrolment of the first deed, conveyed the same lands by a bargain and sale to another person; afterwards both of the indentures were enrolled, and it was held, that the second bargain and sale was void; for, say some of the books, at the time of the second bargain and sale the bargainee had no estate in him to give to a stranger ^p. But Lord Coke tells us ^r, that that case was determined on account of the special penning of the second deed of bargain

ⁱ 2 Inst. 674

^k 4 Co. 71. a.

^l Moor, 41.
Hob. 165.

^m Dyer, 218. b.
pl. 6. Yelv. 123.

ⁿ Cro. Car. 217,
218.

Vide Owen. 69,

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^o Ander. 161.

^p 2 Inst. 674.

^q Cro. Jac. 52.

409.

Cro. Car. 218.

Noy. 106.

^r Cro. Jac. 409.

Cro. Car. 218.

Hob. 136.

^s 2 Inst. 675.

bargain and sale, and that otherwise the second bargain and sale, before the enrolment of the first, would have been good. Indeed in Croke's report of the case^s, a *mis-recital*^{* Cro. Jac. 52, 53.} in the second bargain and sale seems to have been the cause of the determination of the court. However, it seems to be agreed, that a bargainee before enrolment may be a good tenant to the *præcipe* for the purpose of suffering a recovery, and he may also receive a *release*¹; he may likewise maintain an assize before enrolment^v. So if the bargainee die before enrolment, his wife shall have dower, if the deed be afterwards enrolled within the six months^w; for notwithstanding the bargainor or bargainee die before the enrolment, yet if the deed be afterwards enrolled within the time limited by the act, it shall take effect from the delivery of the deed². If there be two jointenants,^{2 1 Inst. 675.} and one of them bargains and sells his estate in fee, and then the other dies before enrolment, and afterwards the deed is enrolled, the moiety only passes to the bargainee, and the other shall survive to the bargainor^v. So if a man bargains and sells lands, and then takes a wife, and dies, and afterwards the deed is enrolled, yet the wife of the bargainor shall not have dower². In the case of Parker v. Bleeke², where a person seised of a copyhold in fee, in which there was a custom that the wife of every copyholder, who died seised in fee of any copyhold tenement, should be endowed, became a bankrupt, and the commissioners bargained and sold the land; the bankrupt died, and the deed was enrolled;

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² 1 Inst. 675.
¹ Vent. 360.
² 2 Ander. 161.

^{* Cro. Jac. 52.}
^{53.}

^{2 1 Inst. 674.}
^{675.}
¹ And. 229.

^{v Bro. tit. fait.}
^{enrol. pt. 9}

^{2 Cro. Car. 260.}
^{1 Inst. 675, 509.}

it was held, that his wife should not be endowed; for as the enrolment had a relation to the time the use was raised, the copyholder did not in fact die seised. So if a bargain and sale be of a manor and an advowson appendant, and the church becomes void before the enrolment, the bargainee shall have the benefit of the presentment, and all the arrears of rent incurred before the enrolment, if the deed be enrolled within the six months^b. If a bargainor and bargainee joined in the grant of a rent-charge, and the deed is enrolled within the six months, it is the grant of the bargainee, and confirmation of the bargainor^c.

^b Cro. Car. 217.

^c Co. Litt. 147. b.

Though the enrolment has a relation, for the advantage of the bargainee, to avoid all mesne incumbrances, and conveyances made to strangers, yet when a conveyance is made to the bargainee himself before the enrolment, then it seems, that the bargainee shall take by such subsequent conveyance. Therefore, if A. bargains and sells to B. and before the bargain and sale is enrolled, the bargainor levies a fine, suffers a recovery, or makes a feoffment to B., the bargainee shall be ~~in~~ by the feoffment, fine, or recovery; because when a conveyance by the common law, and one by the statute law concur, that by the common law shall be preferred^d. But if between the making of the bargain and sale, and the levying the fine, &c. the bargainor encumbers the land, then the enrolment shall have a relation for the avoiding such incumbrance in favour of the bargainee^e.

^d 4 Co. 70. b.

71. a.

Yelv. 124.

4 Leon. 4 pl. 18.

Moor. 337. 338.

Cro. Eliza. 917.

^e 4 Co. 71. a.

Mob. 222. sed.

cont.

Gilb. uses, 294.

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In the case of *Hall v. Dewes* it was held,¹ that if a man bargains and sells a reversion, and then the rent is incurred, and afterwards the deed is enrolled, the bargainee is entitled to the rent incurred before the enrolment. But if the rent be paid by the tenant to the bargainor, it is a good payment, and the bargainor is not accountable.² So if a bargainee grants a rent before enrolment, it is a good grant, if the deed be afterwards enrolled within the six months.³ But if a bargain and sale be to A. and B. and A. releases to B. before any enrolment, this release is void.⁴ and yet if a disseisor bargains and sells the lands to B. and the disseisee releases to the bargainor, and then the deed is enrolled; in this case the release is good for the benefit of B. the bargainee.⁵ but if the disseisee release to the bargainee before the enrolment, it is void.⁶ If a man makes a lease for life, with a clause of re-entry, reserving rent; and then bargains and sells the reversion, and the bargainee demands the rent, which the lessee refuses to pay, notwithstanding the deed is afterwards enrolled, yet he cannot enter for the forfeiture.⁷

The statute directs the enrolment to be made within six months after the *date* of the indenture. The six months, therefore, are to be accounted from the *date*, and not from the *delivery* of the deed, unless the deed has no date, in which case they are reckoned from the delivery.⁸ With respect to the calculation of the *six months*, they must be computed after the space of the *lunar* months, viz. twenty-eight days per month.⁹ The enrolment

¹ Latch. 157.
² Sid. 310.

³ Owen, 150.
Godb. 156.
Ca. 209.

⁴ Cro. Car. 217.
⁵ Shep. T. 224.

⁶ Mocket's case,
Shep. T. 224.
⁷ Roll. R. 425.

⁸ Owen, 69.

⁹ Moor, 48. pl.
126.
Hob. 149.

¹⁰ Shep. T. 221.
last edit.
Dyer, 218. b.

* Hob. 140.
Moor, 42. pl.
128.

7 2 Roll. ab.
520. pl. 7.
Dyer, 218. b.

ment may be either on the same day off which the deed is dated *, or it may be on the last day of the six months, not reckoning the day of the date to constitute a part of the six months †.

† Dyer, 229. a. b.
Yelv. 123, 124.
Gilb. uses, 93.

By the 2. f. of the statute of enrolments it is provided, that that act should not extend to lands within any city, borough, or town corporate, wherein the mayors, recorders, or other officers have authority to enroll deeds. All bargains and sales then of such lands, as are excepted out of this statute, must have the same operation, as they had before, and of course the possession is executed from the date of the deed ‡. In these cases therefore the rules respecting the relation of the enrolment to the delivery of the deed are avoided.

• 8 Co. 94. a.
2 Co. 36. a.

The statute of enrolments directs, that all bargains and sales of lands of *inheritance* or *freehold* shall be enrolled; but it does not notice bargains and sales of *terms of years*: therefore, if a man seised of an estate of freehold bargains and sells it for a term of years, such bargain and sale requires no enrolment to perfect it §. As the words *bargain* and *sell* are not absolutely necessary to make lands of inheritance pass by way of bargain and sale, it has been held, that if a man *in consideration of money* covenants to stand seised to the use of his *son*, this consideration makes the conveyance a bargain and sale, and therefore an enrolment is necessary ¶: but *secus* if the consideration had been *natural love and affection*.

• 8 Co. 94. a.
7 Co. 39. b.
1 Vent. 138.

I shall

I shall here add the form of a bargain and sale, to make the bargainee a tenant to the *præcipe* for the purpose of suffering a *recovery*.

THIS Indenture tripartite, made the day of in the 29th year of our sovereign lord George the third, by the grace of God of Great Britain, France, and Ireland; king, defender of the faith, and so forth, and in the year of our Lord 1789; **Between** Daniel Den, of Lincoln's inn, in the county of Middlesex, esquire (eldest son, and heir at law of Daniel Den, late of in the parish of in the county of Essex, esquire; deceased) of the first part, Edward East, of Chancery-lane, in the parish of Saint Andrew's, Holborn, in the county of Middlesex aforesaid, gentleman; of the second part; and Francis Foley, of the same place, gentleman, of the third part; **Witnesseth**; That for docking, barring, and extinguishing all estates tail; and all reversions and remainders thereupon, expectant or depending of and in the messuages, lands, tenements, and hereditaments, hereinafter granted, bargained, and sold, or mentioned or intended so to be, or any part thereof, and for limiting and assuring the same, with the appurtenances unto and to the use of the said D. Den (party hereto) his heirs and assigns for ever, and in consideration

The statute of enrolments requires all bargains and sales of lands of inheritance to be by deed *indentured*. If a deed be *indentured* and *enrolled*, it does not signify whether the words in the beginning of it be such as are usually inserted in a deed *poll*.
3 Leon. 16, 17.

deration of the sum of five shillings (A) of lawful money of Great Britain, to the said D.

(A) There should always be a *valuable* consideration to support a bargain and sale, for its very name imports a *quid pro quo*. It has been held, that no use can be raised on this conveyance upon a *general* consideration; therefore, if a man bargains and sells his lands for *divers* good causes and considerations, no use can possibly arise to the bargainee^h. But if there be such a *general* consideration, or indeed if there be no consideration at all expressed, yet an averment, that a *valuable* consideration was actually paid, will be sufficient to raise the use in the bargaineeⁱ. So the consideration that one was bound in a recognizance, or the consideration of a long acquaintance, or intimate friendship, &c. are not sufficient to create a use by way of bargain and sale^k. The consideration of natural love and affection to a son, or of an intended marriage; are not good to make the lands pass by bargain and sale, unless money is expressed to be paid^l. It was formerly held, that where a particular consideration has been expressed in a deed, an averment of another might well be made^m; but it seems at present, that if in a deed the consideration of money is expressed, and afterwards the parties attempt to aver the consideration of blood, &c. such averment cannot be made; for it would be of mischievous consequences, and liable to the danger of perjury, which the

statute

^h 1 Co. 176. a.

ⁱ Leon. 170.

² Roll. ab. 786.

¹ 1 Co. 176.

Moor, 570.

¹ Leon. 170.

² Cro. Eliza.

394.

² Roll. ab. 783.

¹ Cro. Jac. 127.

¹ Vent. 138.

^m 1 Co. 176. a.

² Co. 76. a. b.

D. Den (party hereto) in hand paid by the said E. East, at or before the sealing and delivery

statute of frauds intended to prevent, to suffer parol evidence to prove, that the consideration of blood, &c. was intended, contrary to that of money particularly expressed in the deed ^a.

Any consideration, if it be the most trifling, will serve to raise a use on a bargain and sale; therefore, the sum of five shillings^o, or the reservation of twelve-pence^p, or a pepper-corn^q, are all equally good considerations to support uses on this conveyance. So the consideration of a competent, or a certain sum^r, or of so much money to be paid at a day to come^s, are all valid. If a man bargains and sells his lands, with a proviso or condition that the bargainee pays at such a day such a certain sum, the consideration here expressed in the condition is good to support the bargain and sale^t: or if a bargain and sale is made in consideration of articles, it is good, if it be recited, that those articles were entered into for the consideration of money^v. It seems, that after a verdict, the want of a consideration appearing on the face of the conveyance will not vitiate the deed, for the jury would not find for the bargainee in such a case, if no consideration was proved^w.

We must observe, that there is no necessity that the bargainee himself should pay the consideration money, for if it is paid by a stranger, it will be sufficient to raise the use

^a 2 P. W. 204: Clarkfon v. Hanway.

^o 2 Roll. ab. 787, 788, ^p 10 Co. 34. a.

^q 1 Mod. 262, 263.

^r Mod. 252, 253.

^s 2 Roll. ab. 786: Moor, 570.

^t Dyer, 337. a.

^u 1 Leon. 6.

^v 3 Keb. 201.

^w 1 Vent. 108,

109. Cro. Eliza. 812.

delivery of these presents (the receipt whereof is hereby acknowledged) he the said D. Den, party hereto, (B) hath granted, bargained and

in the bargainee: therefore if a man, in consideration of a certain sum paid by B. bargains and sells his lands to A. for life, remainder to C. in fee, this is good; for though A. and C. did not themselves pay the consideration, yet it is evident, that it was paid upon their account^z: or if in this case the bargain and sale had been to B. for life, with many remainders over, the consideration might well extend to those in remainder^z.

^z 2 Roll. ab.
784. pl. 6.
Winch. 61.

^z 2 Roll. 784.
pl. 7.

(B) This conveyance to make a tenant of the freehold for the purpose of suffering a recovery, is supposed to be made by a *tenant in tail*. That a tenant in tail may convey by a bargain and sale, and that the estate so conveyed will be sufficient to support a fine or recovery, are points clearly warranted by the books^a, and long acquiesced in by practice. I might, therefore, in this place well avail myself of the circumstance of a tenant in tail being allowed to convey by this conveyance, in order to confirm the observations which I have already hazarded^b, of the capability of a tenant in tail to stand seised to a use *since* the statute; for though the *use* and *possession* at present pass almost instantaneously, or (as it has been expressed) *tanquam uno flatu*, yet the principles upon which the conveyance by bargain and sale was founded originally continue to this day. By the bargain and sale,

^a Vide supra.
427, 428.

^b Supra, 149,
150, 151.

sale, the bargainor becomes seised to the use of the bargainee, and then the statute executes the possession, so that the bargainee is nothing but a *cestuique use*. Hence it is, that no use can be declared on the estate or possession of the bargainee, as I have in another place endeavoured to prove. By these previous remarks I only mean to suggest, that if a tenant in tail cannot stand seised to a use, he cannot, according to the strict legal notion, convey by bargain and sale, because by such bargain and sale he immediately becomes seised to the use of the bargainee, who thereby has a base fee only determinable by the entry of the issue: and yet the books, and the practice of very able men, authorize us to conclude that a tenant in tail may convey by bargain and sale. Here then, notwithstanding the consideration of tenure *immediately* between the donor and donee, and the appropriation of the lands by the statute of Westminster 2. c. 1. solely to the use of the tenant in tail^d, we see, that by a bargain and sale the tenant in tail stands seised of the entailed lands to the use of the bargainee.

According to the true idea of a bargain and sale, no person can convey by it, who is not capable of standing seised to a use^e. Therefore, the king cannot properly convey by a bargain and sale^f; and as it has been held by the generality of the most respectable authorities, that *corporations* cannot stand seised to a use^g, it rather appears inconsistent, that they should be allowed to convey by bargain and sale. However, with respect to corporations, the judges have seemed anxious to find out reasons

^e 2 Salk. 619.

^d Supra, 143 to 151.

^e Gilb. uses, 285

^f Cro. Jac. 60.

^g Bro. feoff. al.

uses, pl. 40.

1 Co. 122. 2.

Shep. T. 484.

edit. 5.

Jenk. Cent. 193.

Flowd. 102.

and sold, (C) and by these presents **both** grant, bargain, and sell unto the said E. East, his heirs and assigns, **all** those messuages, lands, tenements,

Ba. uses, 57.
 2 Vern. 399.
 Gilb. uses, 170.
 285.

§ 2 Leon. 121.
 § Leon. 175.

reasons to support bargains and sales made by them, and of course to set aside in some measure their strict legal acceptation. Therefore, in the case of Sir Thomas Holland and Bonis^g, the court established a bargain and sale made by a corporation, holding that though a corporation could not *take* an estate to the use of another, yet they might *charge* their *own possessions* with an use to another. As to this nice distinction between *taking* an estate to the use of another, and *holding* an estate *already acquired* to such a use, I must submit it to the consideration of the learned reader. I shall only observe in this place, that to prevent any serious consequences, which may arise from a doubt of this nature, it seems always prudent to make a corporation convey by a feoffment with livery, or by a lease and release, with an *actual entry* by the lessee previous to the release^h.

^h Vide
 Butl. note 1.
 Co. Litt. 271. b.
 under fol. 276.
 a.

^g Supra, 89, 90,
 91.

Every person who is capable of *taking* or *receiving* a use may be a *bargainee*; therefore a bargain and sale enrolled is a good conveyance to vest a use in the king, and so make him a bargainee^g.

(C) As the conveyance by bargain and sale originated from a principle of equity, the chief requisite to support it according to that principle was the *consideration*; but now the statute 27 H. 8. c. 16. has made an enrolment

ment also necessary to its completion. When therefore a bargain and sale has these two essential properties, viz. a valuable consideration, and an enrolment, the usual words *bargain and sell* are by no means necessary or material. Thus, if a man for a valuable consideration (without the words *bargain and sell*) *covenants to stand seised to the use of another*¹, or if he *aliens, grants, or demises*², or if he gives and *enfeoffs* another³, and the deed is properly enrolled, any of these words will serve to carry the use to the bargainee. It is said in Fox's case^v, that the *intention* of the parties is the creation of uses, and therefore if in any clause of a deed it appears, that the intent of the parties is to pass the lands by *possession at common law*, there no use shall be raised; and that a letter of attorney to make livery of seisin, or a covenant to make livery according to the form and effect of the deed, &c. is clearly indicative of such an intention. But with respect to this assertion, I apprehend it must intend, that if a man *covenants to stand seised to the use of one of his blood*, and in that deed of covenant there is a letter of attorney to deliver seisin, that this shews the intent, that it should not pass by way of covenant to stand seised, but by way of feoffment; because in the direction of uses equity follows the meaning of the parties, and where it finds that the parties intended a particular ceremony to be performed, it must wait till that ceremony, viz. livery of seisin, is perfected. But we find it expressly determined, that if a man, in consideration of money expressed in the deed, grants and enfeoffs another

with

¹ 8 Co. 94. a.² Vent 138.³ Co. 39. b.^v 8 Co. 93. b.

94. a.

Cro. Eliza 166.

¹ 3 Leon. 16.

pl. 39.

^v 8 Co. 94. a.

3 Leon. 16,
17. pl. 39.
2 Roll. ab. 787.
pl. 5.

with a letter of attorney to make livery and seisin, and the deed is *enrolled* within the six months, this conveyance is a good bargain and sale^w; for though the parties shewed, that they at first intended, that the lands should pass by the livery, yet the subsequent enrolment before livery evinced, that they had altered that intention: and indeed as the equity to pass the use arises from the payment of the money, it will be guided by that consideration, notwithstanding the letter of attorney to deliver seisin, provided such livery be not given before the enrolment. It must be observed, that as the words *covenant to stand seised* (where the consideration is *money*)

8 Co. 94. a.
7 Co. 39. b.
Vide 1 Leon. 25,
where the
words *bargain*
and *sell* with
livery were suf-
ficient to sup-
port a *feoffment*.
7 1 Vent. 137.
Crossing v.
Scudamore.

are effectual to support a *bargain* and *sale*^x, so on the other hand, the words *bargain* and *sell* (where the consideration is *blood*, and *natural affection*) will serve to establish a *covenant to stand seised*^y.

Moqr. 34. pl.
113.

If a bargain and sale be properly enrolled, the words *bargain* and *sell* are alone sufficient to pass *incorporeal* hereditaments by way of use, such as rents, and reversions, &c.^z But where such *incorporeal* hereditaments are intended to be passed by way of bargain and sale, it seems advisable, that the word *grant*, or *alien* should be added to those of *bargain* and *sell*; for if it should so happen, that the deed is not *enrolled* within the *six months*, they may then pass by either of the former words by way of grant at common law, but cannot by either of the words *bargain* or *sell* even with attornment^a.

3 Cro. Jac. 210.
Cro. Eliz. 166.

Where the words of a conveyance are *demise*, *grant*, *bargain* and *sell*, it is at the option
of

tenements, and hereditaments, (D) &c. &c.
(the parcels should here be properly recited and described)

of the grantee to take it either by way of demise or grant at common law, or by way of bargain and sale, if the consideration be that of money ^b. Indeed, if the words are only *demise* and *grant*, with a pecuniary consideration, or the reservation of a pepper-corn, as such considerations are capable of raising a use, those words may, at the election of the grantee, amount either to a bargain and sale, or grant at common law ^c. However, if a tenant for years makes a conveyance for a valuable consideration by the words *dedi et concessi*, with a letter of attorney to deliver seisin, which is done accordingly; this conveyance shall not operate as a bargain and sale, for the letter of attorney, and delivery of seisin, shewed that it was not intended as such; but it shall enure as a feoffment, and consequently will operate as a forfeiture of the estate for years ^d.

^b 2 Co 35. a. b.

^c Cro. Eliz. 166.

¹ Mod. 262, 263.

² Mod. 252, 253.

Barker v. Keet.

^d Dyer, 362. b. pl. 20.

(D) Not only messuages, lands, and tenements may be conveyed to uses, but the statute also particularly mentions *honours, castles, manors, rents, services, reversions, remainders, and other hereditaments*. It seems that advowsons, tithes, liberties, franchises, seignories, a stewardship, or bailiwick in fee, may be granted by way of use, and of course by a bargain and sale ^e. So it is said, that common may be granted to a use ^f. Not only a rent *in esse*, but a rent *de novo*, may be limited

Vide supra, 119 103.

^e Shep. T. 219. b. edit. 5.

W. Jones, 117. 127.

^f Shep. T. 219. W. Jones, 117. fed cont. ibid.

to 127.

described) together with all and singular the messuages, edifices, buildings, barns, stables, mills,

2 Co. 54. a.
Supra, 163.

1 Cro. Jac. 189.

to a use; therefore, if a man bargains and sells land reserving a rent, this reservation is a good creation of the rent^e. However, generally speaking, there cannot be a use of such things as are not *in esse* at the time of the grant, as a way, common, &c. newly created. Therefore, in *Beaudley v. Brook*^h, where A. bargained and sold lands to J. S. in fee, with a way over other of the lands of A. it was held, that the bargain and sale of the way was void.

2 Co. 36. a.
3 Co. 94. a.

1 Gilb. uses, 85.
286.

1 Supra, 42 to
71. alio 149.

A man seised in fee may bargain and sell the lands for a term of years, and the use will be executed in the bargainee by the statute without any enrolmentⁱ. But if a man possessed of a term for years bargains and sells it (without any other words) this bargain and sale does not carry the legal interest to the bargainee^k, nor indeed according to the above offered ideas respecting uses limited on terms of years, does it pass a use; for a term of years neither comes within the statute 27 H. 8. c. 10. nor 1 Rich. 3.^l and therefore cannot be executed by the former, when bargained and sold. But in such a case, it seems but consistent with equity, that the bargainer should be a trustee for the bargainee. When therefore a man is possessed of a term, and wishes to grant it over, he must use such words as will pass the legal interest therein, such as *grant, alien, or assign*, which

mills, dove-houses, orchards, gardens, courts;
 curtilages, yards, backfides, lands, tenements,
 meadows, feedings, pastures, commons,
 woods, underwoods, rents, reversions, per-
 quisites, liberties, franchises, privileges, ways,
 paths, passages, links, sewers, drains, lights;
 easements, watercourses, waters, profits;
 com-

which are peculiarly adapted for that pur-
 pose; but the words *bargain* and *sell* have
 only an operation in raising a use, which in-
 deed cannot be limited on a term of years. 1512.

Thus in a case ^m, where a husband possessed ^{n Moor, 171.}
 of a term of years in *jure uxoris*, and seized ^{pl. 304}

of the fee simple and inheritance in his own
 right, for a valuable consideration conveyed
 the lands by the words *bargain* and *sell*, which
 conveyance was duly enrolled: now though
 the husband might in this case have disposed
 of the *legal* interest in the term by using
 proper words for that purpose ⁿ, yet it was ^{Co. Litt. 46. b.}
 held, that by the words *bargain* and *sell* no-
 thing but the use of the inheritance passed,
 which was executed by the statute accord-
 ingly; but as to the lease held in *jure uxoris*,
 those words neither passed the *legal* estate nor
 the *use*; and in such case the bargainor could
 only be trustee for the bargainee of the term
 during his own life; after which the wife
 might claim the residue.

It appears, that if a son bargains and sells
 the inheritance of his father, the bargain and
 sale is void; and he shall claim it notwith-
 standing such assurance, after the death of his
 father.

ⁿ Vide Co. Litt.
 265. a.
 Gilb. uses, 26.

‡ As to such things as are appurtenant to the land, vide *supra*, 355, 356.

§ As to the words estate, right, title, and interest, vide *Co. Litt.* 345.b.

commodities, advantages, emoluments, hereditaments, with the appurtenances^c whatsoever to the said messuages, lands, tenements, hereditaments, and premisses hereby bargained and sold belonging or in any wise appertaining, or to or with the same, or any of them, now or at any time heretofore used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part or parcel thereof, or of any part thereof, or appendant or appurtenant thereto; and the reversion and reversions, remainder and remainders of all and singular the said messuages or tenements, lands, hereditaments, and premisses, or any part or parcel thereof (E): And also all the estate, right, title, interest^f, property, claim, and demand whatsoever of him the said D. Den, (party hereto) of, in, and to the said messuages, lands, tenements, hereditaments, and premisses hereby bargained and sold, or expressed or intended so to be, and every of them, and every or any part thereof: To have and to hold the said mess-

* Vide *Vaugh.* 51.
Co. Litt. 309.b.

Supra, 361, 362

(E) It is scarcely necessary in this place to remark, that upon a bargain and sale of a rent, reversion, or remainder, there was no necessity for an attornment to perfect the grant, even previous to the statute 4 Ann. c. 16. s. 9. ^p We have already had occasion to notice, that a grant of *lands* and *tenements* will, without any other words, pass not only a *reversion*, but a *rent-charge*: it however is prudent to insert this particular grant of all reversions and remainders.

messuages, lands, tenements, hereditaments, and all and singular other the premises, with their and every of their appurtenances, unto the said E. East, his heirs and assigns, (F) **To the use of the said E. East, his heirs and assigns; To the intent and purpose** (G) that he the said E. East or his heirs may become a good tenant or tenants of the *freehold* of the said messuages or tenements, lands, hereditaments, and premises hereby granted, bargained, and sold, or mentioned or intended so to be, with the appurtenances to

(F) The conveyance by bargain and sale, when made by a tenant in tail, can only give the bargainee a base fee, determinable by the entry of the issue, although the limitation be absolutely in fee ^q. At common ^q 2 Salk. 619. law, if a man seised in fee made a bargain and sale for a valuable consideration, it would have carried *the fee* to the bargainee without the word *heirs*: but since the statute, which executes the possession to the use, the omission of that word would convey only an estate for *life* to the bargainee ^r.

(G) We might here apply what has been said in a former page ^s respecting the distinction between a *use*, and a *special intent* or *trust*. In the conveyance now before us we see that the *use* first passes to the bargainee, and then the *possession* is executed in him by the statute: when both the *use* and *possession* are vested in him, then the *special intent* to suffer a recovery remains to be performed.

^r 1 Co. 87. b.

^s 100. b.

^t 8 Co. 94. a.

^u Supra, 18.

to the same respectively belonging. ~~To the~~
END that one or more good and perfect *common* recovery or recoveries may be thereof had and suffered in the manner hereinafter mentioned; for which purpose it is hereby declared and agreed by and between all the said parties to these presents, that it shall and may be lawful to and for the said F. Foley, at the costs and charges of the said D. Den, (party hereto) to sue forth and prosecute, out of his Majesty's high court of chancery, one or more writ or writs of entry *sur disseisin in the post* (H) returnable before his Majesty's justices of the court of common pleas at Westminster, the first or some subsequent return of Michaelmas term next ensuing, or some other subsequent term, thereby demanding, by apt and convenient names, quantities, qualities, numbers of acres and messuages, and other descriptions, the said messuages or tenements, lands, hereditaments, and premisses, with the appurtenances, against the said E. East or his heirs; to which said writ or writs of entry the said E. East or his heirs shall appear gratis, either in his or
 their

(H) The reason why the writ of entry *sur disseisin in the post* was chosen for the purpose of suffering a recovery was, because the tenant may in this action vouch at large, and is not confined to vouch within the degrees of the *per*, the *per* and the *cui*, or the *post*: therefore it is the safest action for purchasers, who need not fear writs of error for

their own proper person or persons, or by his or their attorney or attornies thereto lawfully authorized, and vouch over to warranty the said D. Den. (party hereto), who shall also appear gratis, either in his own proper person, or by his attorney or attornies thereto lawfully authorized, and enter into warranty, and vouch over to warranty the common vouches of the same court, who shall also appear gratis, and after imparlance make default, so as judgment shall and may be thereupon had and given for the said E. Foley, to recover the said messuages or tenements, lands, hereditaments, and premises, hereby granted, bargained, and sold, or mentioned or intended so to be, against the said E. East, or against his heirs, and for the said E. East to recover in value against the said D. Den. (party hereto), and for the said D. Den. (party hereto) to recover in value against the common vouches; and that execution shall and may be thereupon had and awarded, and all and every other act and thing done and executed, needful and requisite for the suffering and perfecting of such common recovery or recoveries, with vouchers, as aforesaid: **And** it is hereby declared and agreed by and between all the said parties to these presents, that from and immediately after the suffering and perfecting of the said common recovery or recoveries, so as aforesaid, or in any other manner, or at any other time or times, suffered or to be suffered, the said common recovery or recoveries, and all and every other common

¶ Vide also a recovery with single and double voucher, 2 Cruise 218, 219.

recovery or recoveries, fines, conveyances, and assurances in the law whatsoever, had, made, levied, suffered, or executed, or hereafter to be had, made, levied, suffered, or executed, of the aforesaid messuages or tenements, lands, hereditaments, and premisses, or any of them, or any part thereof, by or between the said parties to these presents, or any of them, or whereunto they or any of them shall be parties or privies, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended to be and enure, and the recoveror or recoverors in the said recovery or recoveries named or to be named, and his or their heirs, shall stand and be seised of the said messuages or tenements, lands, hereditaments, and premisses, hereby granted and released, or mentioned and intended so to be, and every of them, and of every part thereof, with the appurtenances, **To the only proper use and behoof** of the said D. Den, his heirs and assigns for ever, and to and for no other use, intent, or purpose whatever (F).
In witness, &c.

(I) The use of the recovery is here particularly declared to the recoveree and his heirs: however, without this declaration, the use would in this case, according to the rules we have before laid down, result to him^v. The declaration of the use here precedes the suffering of the recovery, and is therefore a deed to *lead* the uses of the recovery, as well
as

^v *Supra*, 93, 94.

as to make a tenant of the *freehold*. We have before explained the manner of declaring the uses of a recovery or fine by deed *precedent* or *subsequent* ^w.

^w *Supra*, 211
to 221.

A s s

LEASE

LEASE AND RELEASE.

THE most modern, and at present the most common of all conveyances, is that by lease and release. It was invented soon after the statute of uses; and as it is in general so made as to avoid the necessity of an actual entry, and at the same time not being subject to the statute of enrolments, it has been found much more convenient than a ~~feoffment~~ with livery, or a bargain and sale enrolled. Though this manner of transferring property by lease and release, when completed, has but the operation of *one* conveyance, yet its very title informs us, that in order to effectuate its completion, we must have recourse to *two* distinct assurances. The first assurance, however, is merely auxiliary, or preparatory to the second; and when both are perfected, whether the estate created by the first is merged or whether enlarged by the accession of that transferred by the second, the two estates certainly do not
exist

exist separate, or distinct from each other. This will more clearly appear by considering the manner in which this double species of conveyance operates. The first necessary step towards its formation is to create a small estate (as a term for a year, &c.) which estate for a year or years must be actually vested in the grantee, that is, he must have the *possession*, and not merely a *right* to such possession: in order to create this small estate, any conveyance may be used, which can effectually vest the estate in the person, to whom the conveyance is made, as just mentioned. Supposing this preliminary estate already and perfectly formed, then comes a conveyance of a larger estate from the grantor of this primary estate to the grantee, which secondary conveyance is termed a *release*, and is that species of release, which operates by way of *enlargement*; and it is a conveyance merely by the *common law*. Now, in order to render this *release* by way of *enlargement* effectual, it is necessary, that there should be a *privity* of estate between the *releasor* and *releasee*. Therefore, before I enter into an enquiry concerning the particular operation of the *release*, when made to a person who has a *privity* of estate, and also a *possession* capable of receiving such release, it will be necessary previously to consider, 1st, What constitutes this *privity* of estate: and 2^{dly}, What kind of *possession* is sufficient to enable the grantee to receive a release from the grantor.

Lord Coke^a has laid it down as a *certain* Co. Litt. 274. rule, that when a release enures by way of *enlarging*

enlarging an estate, there should be a *privity* of estate between the *releasor* and *releasee*. Thus, if A. seised in fee leases lands to B. for life or years, by virtue of which lease B. enters and takes possession; here, if A. releases to B. in fee, in tail, or for life, this release is good to vest an estate in B. according to the limitation expressed by the parties, because there is a *privity* between A. and B. as lessor and lessee^b. It is said in Rolle's abridgment, that if a lessee for life or years grants over his estate, the original lessor may release to the grantee of the lessee either in fee or for life, which release will be good by way of enlargement^c. In this case then, the *privity* of estate appears not to be lost by the grant of the *lessee*, because the grantee is placed in exactly the same situation and estate, as the lessee was. But it seems, that if a donee in tail, or a lessee for life or years, grants an estate *less* than that, which is taken under the first gift or lease, then the *privity* between the first donor or lessor and second lessee is entirely lost: therefore, if a lessee for twenty years leases for ten years, and the first lessor releases to the second, this release is void^d. The estate of a tenant in dower or curtesy is capable of receiving a release, and a release may be made to a *grantee* of a tenant in dower or curtesy on account of the *privity* and *notoriety* of possession^e. After a grant by tenant by the curtesy of his estate, there still remains a *privity* between him and the reversioner, so as an action of waste may be brought against him; and yet a release to him would be void, because he has no estate after

^b Litt. f. 465.

^c 2 Roll. ab. 401.
pl. 9. cites
18. E. 3. 40.
Dyer, 4. b. pl. 2.

^d Co. Litt. 273.
a.
Dyer, 4. b. pl. 2.

^e 2 Roll. ab. 401.
pl. 8.

after the grant^f. A person who has possession by virtue of a lease at will, is capable of receiving a release^g; but a tenant at sufferance, or a disseisor, cannot take a release by way of enlargement, because no privity can exist between him and the owner of the inheritance^h. So the lessee of a tenant at will has not a sufficient privity to enable him to take a releaseⁱ. Though a tenant by *elegit* or statute merchant has not that privity, which is required to enable him to have a release^k, yet, if the person who has the inheritance confirms the estate of such tenant, he may receive a release, because the confirmation creates a privity^l. So if there be a *feme covert*, who is tenant for life, as her husband in this case gains a freehold in her right by the marriage, the same privity and estate which she had *before* the marriage, is *since* given or placed in him; and therefore a release by way of enlargement may be made to him of the inheritance^m. Likewise a lessor may enlarge the estate of a *baron* and *feme* by a release, though they are but tenants *per auter vie*ⁿ.

It seems, that the intervention of any mesne particular estate does not counteract the operation of this species of release, when made by the reversioner to the first particular tenant. Therefore, if there be tenant for life, remainder in tail, reversion in fee, he in the reversion may release to the tenant for life, notwithstanding the intervening estate tail^o. A release may not only be made by the person who is seised of the *reversion*, but by him in *remainder*. Thus, if an estate is limited to

A. for

^f Co. Litt. 273. a.

^g Litt. f. 460.

^h Co. Litt. 271.

ⁱ 270. b.

^j Cro. Eliz. 830.

^k 2 Roll. ab.

401. pl. 12.

^l Butl. note 1.

^m Co. Litt. 273. a.

ⁿ 2 Roll. ab.

401. pl. 14.

^o Co. Litt. 470. b.

^p 2 Roll. ab.

401. pl. 11.

^q 2 Roll. ab.

400. pl. 3.

* 4 Roll. ab.
401. pl. 17.

A. for life; remainder to B. in fee. B. may not lease to A. the tenant for life, and such release will be good to enlarge A.'s estate.

The foregoing observations will give the reader a sufficient idea of the *privity* necessary to be observed between the releasor and releasee, in order to make a proper release. Indeed, these rules respecting privity of estate can hardly ever raise a doubt respecting the validity of the conveyance by *lease* and *release*; for when a person wishes to convey by this assurance, he always creates a lesser estate (generally for the term of one year) for the *very purpose* of enabling his lessee or grantee to receive a release; so that it is nothing but a release by a *lessor* or *grantor* to his *lessee* or *grantee*, in which case, as we have already seen, there is the most perfect of all privity. The chief question then, that can ever be made to invalidate a lease and release, must be, whether the *lessee* or *grantee* has, at the time the release is made to him, such a *possession*, as is required by law to render the release effectual. There are two methods of vesting the possession in the *grantee*, viz. either by a lease at common law, or by a bargain and sale under the statute of uses. According to the name which this conveyance bears, it seems, that a *lease* at common law was the original mode of creating this lease for a year, or lesser estate.

* Supra, Litt. f.
465.

* Co. Litt. 270.
a.

We are told by Lord Coke, that a release, which enures by way of enlarging an estate, cannot work without a *possession*, for before a possession there can be no reversion. This rule was meant to apply to leases at common law,

law, where an actual entry was necessary to vest a possession in the lessee; and to illustrate it by an instance, suppose a lease to be made to A. and before he makes an entry the lessor releases to him the reversion, this release is void; for until he enters he has but an *interesse termini*, and no possession; but after the entry of the lessee, then a release made to him is valid*. The statute of uses, however, has made an actual entry unnecessary in cases, where the lesser estate is created by a conveyance deriving its effect from the doctrine of uses. Thus suppose A. intending to convey by lease and release, makes a bargain and sale to B. for a year for a valuable consideration; in this case the use first vests in B. according to the rules of equity, and then the statute executes the possession in the same manner, as the use is limited. Now, the consequence of this construction is, that B. by the operation of the statute of uses has an estate executed in possession, without any actual entry made by him; which estate is sufficient to bear a release of the reversion made by A. or his heirs. Hence we see that, in order to avoid an actual entry, the lesser estate, or term of one year, is commonly at this day created by a bargain and sale. However, even in this case it was said by Mr. Noy†, attorney general to Charles II., that this conveyance could not be maintained without an actual entry by the bargainee or lessee: but the authority of the books‡, and the practice of the most able men in the profession clearly prove, that such an entry in the case of a bargainee is entirely unnecessary; for,

* Litt. f. 419.

† 2 Mod. 252.

‡ Cro. Car. 110.

Cro. Jac. 604.

2 Inst. 675.

Carier, 66.

for, by the operation of the statute alone, he has such a possession as renders him capable of receiving a release. It is usual, and indeed the most proper method, to insert in the bargain and sale (if the term of one year, &c. is intended to be created by that conveyance) the words *bargain* and *sell* only, because it is the opinion of some, that where conveyances may enure two ways, the common law shall be preferred. However, in the case of *Barker v. Keat**, where a conveyance was made without any pecuniary consideration by the words *demise* and *grant*, with the reservation of a pepper-corn, for the purpose of receiving a release of the inheritance, it was held, that the consideration of a pepper-corn was good to raise a use in the grantee, and make the lands pass by way of bargain and sale; and that as the statute executed the possession to the use, there was no necessity for an actual entry to render the release effectual.

With respect to the position, that the releasee must have a *possession* in order to receive the release, it must not be understood, that an *actual* possession is in all cases necessary. For if a man is seised of a *remainder* or *reversion*, and bargains and sells it for a year, here the bargainee has such a vested estate in him in remainder or reversion, as will enable him to take a release of the residue; and yet at the time of the release he has no *actual* possession of either of them, but by the operation of the statute of uses they are *actually vested* in him[†]. The like may be said of all other *incorporeal* hereditaments, for they may be effectually

* 1 Mod. 262.

† 2 Mod. 249.

‡ Vent. 35.

† Butl. note 3.
Co. Litt. 270.a.

effectually granted and conveyed by lease and release ^y.

^y Butl. note 3.
Co. Litt. 270. a.

However, in releases of estates by way of enlargement, there was no necessity, even at the common law, that the person who received the release should be in *actual* possession of the lesser estate, though that lesser estate consisted of *corporeal* property, and was created by a common law conveyance, and not by a bargain and sale. Thus, if there had been a lessee for life, remainder for life, with the reversion in fee, the person in *reversion* might very well have released to the *remainder-man* for life; and yet the person in remainder could have no *actual* possession during the life of the first *lessee* ^a. So if a man had made a lease for years, with a remainder for years, and the first lessee entered, a release to him in remainder for years was good to enlarge his estate ^a: or if a tenant for twenty years in possession had made a lease to B. for five years, and B. had entered, a release to the *first* lessee was good: but in this case Lord Coke says, that the *first* lessee had an *actual* possession, because the possession of B. was *his* possession ^b. So if there had been tenant for life, remainder in tail, remainder in fee to the tenant for life, the tenant for life might release his remainder in fee to the tenant in tail, though he could not his estate for life ^c.

^a 2 Roll. ab.
400. pl. 4. 5.

^a Co. Litt. 270. a.

^b Ibid.

^c 2 Roll. ab.
400. pl. 7.

When the term of one year, or lesser estate, is properly constituted, a release to the bargainee or lessee of this smaller estate has the operation and force of a conveyance merely at the common law. Though the smaller estate

estate in the first instance is created by a bargain and sale, yet that does not vary the construction and force of the release: for as soon as the bargainee receives the release, his primary estate, which was created by virtue of the statute of uses, is by the operation of the release, and accession of the larger or secondary estate, turned and enlarged into an estate deriving its force purely from the rules of the common law. It is the actual constitution of the term, and possession, or vested interest of the grantee, which gives a proper efficacy to the release, and not the manner of creating it, or the conveyance, which constitutes it. That a lease and release, when considered as *one* entire conveyance, or as simply a release (the primary estate certainly not existing separately) derives its effects from the common law, will fully appear, if we attend to its well known, and now long established attributes.

Vide Barr. Cha.
Rep. 386.

In the first place a lease and release must be considered as a conveyance operating by way of *transmutation of possession*; that is to say, it *previously*, according to its very nature, transfers a *possession* at the common law to the releasee, the transmutation of which possession before the introduction of uses was the sole object of the grant or release. Thus if a man released to his lessee, *habendum* to him, his heirs and assigns, this exactly corresponded with a similar limitation upon a feoffment, and gave the *releasee*, as it would have done a *feoffee*, a *fee-simple* at the common law. After the introduction of uses this *possession*, which a release, feoffment, fine, or recovery
pre-

previously transferred, was converted to the purpose of serving *uses* limited to a third person, thereby in effect rendering the estate of feisin of the releasee, feoffee, conusee, or recoveror, as it were, a foundation to raise and build uses upon. After the statute 27 H. 8. c. 10. the use so limited to arise out of the feisin of the releasee, feoffee, &c. was executed in possession by the words of that statute. Therefore if A. bargains and sells lands at this day to B. for a year, and then releases to him, *habendum* to B. his heirs and assigns, to the use of C. for life, remainder to D. for life, remainder to E. in tail, &c. &c. in this case B. the releasee has a feisin or possession transferred to him in fee before any uses are or can be raised; then comes the declaration of the use to C. for life, to D. for life, to E. in tail, &c. which uses are served out of the feisin of B. and by the operation and words of the statute are estates actually vested in the possession of C. D. E. &c. according to the limits of their estates. Hence it is, that it has become usual in marriage settlements to convey by lease and release to A. and B. in fee, to the use of C. the intended husband for life, or until the marriage is solemnized to the use of the intended husband in fee, and from and immediately after the solemnization thereof to the use of C. the husband for life, remainder to the use of the releasees during the life of C. to support and preserve contingent remainders, remainder to the use of the first and other sons of C. in tail, and in default of such issue to the use of all and every of the daughters of the husband,

Vide Mr.
Booth's opinion
at the end of
Hil. Shep. T.

band, as tenants in common in tail, remainders over. Here all the uses, as they arise, are served out of the seisin of A. and B. Before the marriage C. has an estate in fee in possession: as soon as the marriage takes effect the use limited to him ceases, and then the original seisin returns to A. and B. and serves a new use to C. for life, which is also executed by the statute; upon the birth of a son the use vests in him in tail, and so a new use in remainder upon the birth of every other son springs up and vests in them, and so in the same manner with respect to the daughters. So if in this case there is a power reserved to C. the husband to make leases or jointures, when he exercises this power, it takes effect by way of limitation of a use out of the original seisin of A. and B., which by the force of the statute is made an actual estate: and as the use limited by virtue of the power to the lessee, or to the jointress, arises out of the seisin of the releasees, so it takes place of and over-reaches all the other uses of the settlement^d.

^d 1 P. W. 246.
Vide 2 P. W.
659.

As a further proof that this conveyance derives its effects from the common law, we are to observe, that in order to have an execution of an use under the statute there should be a seisin in some third person distinct from *cestuique use*; for the statute expressly says, that where any person, &c. shall be seised to the use of any other person, &c.^e Therefore, if a bargain and sale for a year be made to B. and then the lands are released to him, his heirs and assigns, to the use of him, his heirs and assigns, as the use in this case is de-

^e *Supra*, 139.

declared to the releasee himself, he is in by the *common law*, and not by the statute of uses ^f. But though the releasee in such a case is in by the *common law*, yet that *use*, which is declared to him, is nevertheless a *use* at common law, though not such an one, as is noticed by the statute; for after the declaration he is not only seised of the *possession* but also of the *use*: therefore, that seisin, which before the limitation of the use to himself was open to serve uses declared to a third person or persons, is by that limitation, as it were, wholly filled up, and will not admit of any other uses being limited thereon, upon the principle that a use cannot be limited upon a use. I perceive that Gilbert ^g puts this case, if a feoffment be made in fee to the *use* of the *feoffee*, and his heirs, in *trust* for J. S. and his heirs, quære, Whether this use or trust be not executed in J. S. by the *statute*? For, says he, it seems that the *feoffee* is in by the *common law*, and so the *statute* not *satisfied*. But with respect to this quære, there cannot be a doubt, but the limitation of a use to a third person, viz. to J. S. after a previous declaration of it to the *feoffee*, would be void, and could not be executed in J. S. by the statute ^h: for that statute never intended to execute a use upon a use ⁱ, and is perfectly satisfied in executing the naked possession (unincumbered with a use) to the third person, to whom the first use is declared. This second use to J. S. is however good as a trust, as we have before seen ^k. I need not add, that these observations on a *feoffment* equally apply to a *lease* and *release*.

^f Butl. note under Co. Litt. 276. a. Supra, 139.

^g Gilb. uses, 194.

^h Moor, 46. in pl. 138.

ⁱ Supra, 231.

^k Supra, 231, 232, 233.

13 Co. 56.

Vide
Supra, 139 to
143.

≡ Vaugh. 49.
Dyer, 186. a.
M. 1.

If a release is made to a bargainee for a year, *habendum* to the releasee, his heirs and assigns, to the *use* of him, and *the heirs of his body*; in this case for the benefit of the *issue*, the *statute* would, according to the limitation of the use, divest the estate vested in the releasee by the *common law*, and execute the same in himself in tail by force of the statute¹. Here though the use is declared to the releasee himself, yet as the limitation of the use is of a *less* estate than the seisin in fee, out of which it is served, the statute executes the use in him, as if he were a third person, though in reality and strictness contrary to its own express words. But on the other hand, though many particular or small estates may be carved or served out of a seisin *in fee*, yet there can be no limitation or execution by the statute of any use, which is of a *larger* estate, than the extent of the seisin out of which it is to arise. Therefore, if I convey lands by lease and release, or feoffment, to J. S. for *life*, to the use of W. in tail, or in fee, here W. can only have an estate for life, which must determine by the death of J. S.^m: for J. S. by the release or feoffment only acquires an estate or seisin for life; and that estate being determined by his death, there can no longer remain any seisin, out of which the uses can be fed. This construction has taken place, when the *seisin* has been transferred to one person, and the *use* to be derived out of that seisin has been limited to another: which use is denominated a *statute use*, in contradistinction to a use declared to a releasee or feoffee, which is a *common law use*.

But

But where a conveyance by lease and release or feoffment is made to J. S. and his assigns, *habendum* to him and his assigns, to the use of him the said J. S. *in tail*, though here the limitation of the *use in tail* would be void, as arising out of the seisin of the previous estate *for life* of J. S. yet, as this *use in tail*, supposing it to be limited out of a *seisin in tail*, could not be executed by the statute, because declared to the releasee or feoffee himself; it seems J. S. shall in this case take an estate *tail*, not by way of limitation of a *use*, but in course of *possession* at common law, in the same manner as if a feoffment were made to J. S. *for life*, *habendum* to him *in fee*; this, by the rules of the common law, would give J. S. an estate or possession in fee simple^a.

^a Co. Litt. 299c

Thus, in the case of *Jenkins v. Young*^b, where one M. gave his lands to E. R. and his wife, *habendum* to the said *baron* and *feme* (which limitation after the *habendum* would give an estate for the lives of the baron and feme by the common law) to the *use* of them, and *the heirs of their two bodies*; and for want of such issue, remainder to E. M. and his heirs (which last limitation was clearly void, *by way of limitation of an use*, for the reasons just given); the question was, Whether the *baron* and *feme* had an estate *tail*, or but an estate for their lives? It was argued, that the estate, out of which the *use* should arise, was but for their lives, and the *use* could not make the estate larger than the limitation of the seisin: but it was held, that there was a difference, where an *estate* is limited to *one*, and the *use* to a *stranger*, for

^b Cro. Car. 230a
231. 244b 248c

there the use shall not be more than the estate out of which it is derived: but not when the limitation is to two, *habendum* to them, to the use of the heirs of their bodies, for this is no limitation of the use, nor is it executed by the statute; but it is a limitation of the estate to them and the heirs of their bodies by the course of the common law: and it shall be taken as a limitation to them and the heirs of their bodies, remainder to the other, and the heirs of the other, that the deed may be construed according to the intent of him, who made it.

If the grant in this case had been to the baron and feme for their lives in the *premises*, *habendum* to them *in tail*, to the use of them in tail, there could have been no doubt, but that the *habendum* would have enlarged the estate for lives given by the *premises*^p. But the difficulty was, that both the *premises* and the *habendum* only gave an estate for their lives. However, the judges said^q, that as the limitation of the use and the land was to the same persons, it was like a limitation of the land itself, and as if it had been said, *habendum to them and to the heirs of their bodies*.

The principles laid down in the above case of Jenkins v. Young seem to favour the observations, which were hazarded in a preceding division of this essay on the case of Cooper v. Franklyn^r: for I cannot see how the declaration of the use in fee, when the *habendum* only gives a seisin *in tail*, can transfer a determinable fee to *cestuique use*, any more than a limitation of a use *in tail* to be derived out of the estate of a feoffee or re-leasee

^p Co. Litt. 299.
a.

^q Cro. Car. 245.

^r Supra, 149.
150, 151.

lessee for life, can enlarge that feisin for life into an estate in tail, which latter point, as we have seen, was clearly settled in the case of *Jenkins v. Young*.

It has been doubted whether there can be a *resulting use* on the conveyance by lease and release; that is to say, if a bargain and sale in consideration of money is made to J. S. for a year, and then a release is made to him in fee without any further consideration or declaration of the use, whether in this case the use will result to the releasor?

Thus, where H. brought covenant as assignee of a reversion, and shewed that the lessor, in consideration of five shillings, bargained and sold to B. for a year, and afterwards released to him and his heirs, *virtute quarundam indentur' bargainie venditionis et relaxationis, necnon vigore statuti de usibus, &c.* he was seised in fee: and it was objected, that the use must be intended to the releasor and his heirs, because no consideration of the release, nor express use, appeared by the pleading.

Shortridge v. Lamplugh.
2 Salk. 678.
7 Mod. 71.
2 L. Raym. 798.
Latw. 351.

It was argued in this case, that there could be no resulting use on a lease and release: that nothing passes to the lessee in possession, but by way of enlargement of the estate of such lessee; for it does not operate to give a new estate of the reversion, but to encrease the estate in possession, according to the words of it: so it does not work by *merger* of the first interest, but by *enlarging* it: that if the release does enure only to enlarge the estate, the interest enlarged must be to the use of the lessee, or it cannot be said to be an encrease.

7 Mod. 74:

of it : that if the practice had not prevailed to the contrary, it were very odd to limit the use of a release to any but the lessee ; for which reason it is, that we find it expressed in the clause in the lease, on which the lessor intends to build his release, that the intent of the lease was to pass an estate by release upon it, for the benefit or use of a third person.

That it would be absurd to say, that my conveyance should have no other operation but to extinguish or merge the estate, which the grantee has already, in order to have it brought back to me ; and what need could there be of such a way ? If the party had any such intent, it might soon be done by a surrender.

That if it had been expressed in the deed of release, that he had already made him a lease for *years*, and that for the enlargement of that estate he made the release, there could be no doubt but that it would be to the use of the *releasee* ; and there is no difference between the cases, since this release, in its own nature, enures by way of enlargement : besides, here is also a valuable consideration ; for the lease and release being but *one* conveyance, the five shillings, expressed to be the consideration of the *lease*, shall be participated to the release ; and also the acceptance of the release is in its own nature a consideration, for it implies an alteration of the estate of the lessee, which, to consent to, is a consideration moving from the lessee ; and the only motive of the lessee's parting with the old estate was to get a new one.

On the other side it was urged, that before ^{Vide 2 Raym. 800.} the statute 27 H. 8. c. 10. if A. made a feoffment, levied a fine, or suffered a recovery, without a use declared, and without any consideration, the feoffee, conusee, and recoveror stood seised of the said lands to the use of A. That since the statute of Hen. 8. the law as to this matter is not altered: for the said statute only intended to execute the use to the possession, and by that means to destroy the use; but it did not intend to make any other thing pass by the conveyance than that, which passed before: that there was the same reason that the use should not pass in a *release* without any declaration, or express declaration, as in a feoffment, fine, and recovery; because the *use* and *estate* are *distinct*, and though the estate ^{7 Mod. 71.} passes, yet the use does not, without a consideration or express limitation of it; and they are as much distinct things in a *release* as in any other conveyance; and the precedents are, that when a release is pleaded, there always mention is made of a consideration or express use. 2 Saund. 11. 277. 2 Vent. 120. Co. Ent. 264. 220. 474.

To the objection, that this release enured ^{Vide 2. L. Raym. 801.} by way of enlargement of the lease for a year, and therefore would participate of the consideration of it, and that the lease and release made but *one* conveyance, it was answered, that though the lease and release made but one conveyance as to the passing of the fee, yet they were in truth *distinct* conveyances, and had different operations, the one by the statute of uses, and the other by the common law;

law : that as to what is said, that the release enures by way of enlargement of the estate of the lessee, it is true, that it gives him a greater estate than he had before, but that notwithstanding it destroyed the estate for years by merger, and it cannot participate of the consideration contained in the *lease*, which is perfectly distinct.

Vide 4 Salk.
678.

However, Holt, C. J. without considering the operation of the conveyance, and admitting that there might be a resulting use on it, held, that the manner of pleading the release as above, to the releasee, was good; and that if a *feoffment* be pleaded in the same manner, without shewing the use or consideration, with an averment *virtute cuius* the feoffee was seised, the use shall be intended to be to the feoffee: that that was the form of pleading *before* the statute, and the statute has not altered, but rather confirmed this manner of pleading.

Vide *supra*, 130
131, 132, 133.

Notwithstanding the ingenious remarks made by the counsel for the defendant in the above case, viz. that the extinguishment or destruction of the estate of the bargainee was a sufficient consideration to carry the use to the releasee, when no declaration or pecuniary consideration appeared in the release, and at all events, that the release participated of the consideration in the bargain and sale for a year, yet I am inclined to think, that there may well be a *resulting use* in fee upon this conveyance, partly on account of the reasons given in a former place, but principally from the learned arguments of the plaintiff's counsel in the same case. Indeed I believe it to be

Supra, 95 to 96.

be pretty generally understood by the gentlemen of the profession, that if a release is made in fee without any consideration or express declaration of the use, it will result to the releasor, and of course be executed by the statute. Lord Hardwicke, in the case of *Loyd v. Spillet*^{*}, considered the conveyance by lease and release in exactly the same light as that by *feoffment* with respect to a resulting use; and though he held, that either an express declaration, or consideration however trifling, would carry a use to the releasee, yet the whole tenor of his argument gives us reason to believe, that he took it to be a settled point, that, without the one or the other, the use would result to the releasor.

^{*} Barn. cha. rep.

^{384.}
² Atk. 148.

Powel, in the above case of *Shortridge v. Lamplugh*, doubted whether there could be a resulting use in fee upon a lease and release; and put this case, if a lease be made for *forty* years, and a release thereupon, without consideration or declaration of any use; surely, says he, it cannot be intended to the use of the *lessor* or *releasor*, for the very extinguishment of the estate of the lessee is a good consideration. With respect to this case, I can easily believe, that the extinguishment of an estate for *forty* years is a good consideration to carry the use to the releasee: but surely the reasons of that case cannot apply to the extinguishment of an estate for *six months* or a *year*, which estate is *purposely* created in order to receive a release of the inheritance, and thereby to transfer a seisin in fee to the releasee, to serve either *express* or *implied* uses, and to make the estate of the releasee (like
that

that of a *feoffee*) a mere instrument to serve the uses.

* 7 Mod. 77.

I must here observe, that both Holt and Powel agreed, that if a *particular* use were limited on the release, the *rest* of the use would result back[†]; which shews us, that, if we even admit, that there cannot be a resulting use *in fee* upon a lease and release, that there may, notwithstanding, be such an one of a *lesser* estate, and therefore, at all events, we should be careful in the declaration of the *whole* of the use. Now, if lands are conveyed to A. in fee, by lease and release, to the use of B. for life, it may be asked, why should the residue of the use, after the limitation of it to B. for life, result to the releasor, if the consideration in the first instance would not admit of its resulting without such limitation? However, by the better opinion, it seems that there may be a resulting use after the limitation of a particular estate, although there be such a consideration in the deed as would prevent a resulting use without such limitation, because it is the *intent* of the parties which directs the use in such cases[‡].

‡ Supra, 135 to 138.

¶ Lilly con. 233

‡ Wood con.

776.

We find it laid down by some authors[¶] as a *fixed* rule, that if there be no consideration or express declaration in a release, the use will result to the releasor: but however just (and I really take it to be so) this position may be, yet, as the writers who assert it do not cite any authority for its support, I must only offer it as an *opinion*, and not as an *authority*.

Though a lease and release by a person, who is seised in fee, has the same operation

as a feoffment in transferring a seisin in fee to the grantee, which seisin is such as will serve uses declared to different persons, and made to arise at various times and manners, yet it has not the same or so forcible a power as a feoffment with livery in creating estates *by wrong*, or in passing a greater estate than the grantor is in possession of or entitled to. Thus, a lease and release cannot create a *disseisin*. Indeed, this quality of creating a disseisin is, as we have seen before ^x, peculiarly annexed to the conveyance of feoffment, on account of the very powerful operation of the livery. ^{x Supra, 303.}

This conveyance by lease and release (I mean particularly the release) operates by previously transferring the *lawful* or *rightful* possession of the releasor: therefore we may apply in this place, with respect to its force and operation in conveying estates, what has been said in another place concerning a bargain and sale in producing a *discontinuance*. It was before observed ^y, that no alienation, which is not made by livery of seisin, or what is equivalent to it, can work a discontinuance. ^{y Supra, Butl. note v. Co. Litt. 330.a.} Now, the acknowledging a fine of record, and the judgment to recover in a common recovery, are supposed to be equal to the notoriety of the livery. But a lease and release is not attended with any of these circumstances: its very name tells us, that the releasor can only grant or *release* that, which he lawfully is entitled to: for the releasor can only *release* all his own *right* and *interest*, ^{Litt. f. 609.} but cannot that of another person. Therefore, if a tenant in tail leases or bargains and sells

sells to J. S. for the term of a year or years, and then releases to J. S. all his right and interest in those lands, *habendum* to J. S. and *his heirs* for ever, this release can work no discontinuance, but after the death of the tenant in tail his issue may enter, because he could have *no right* to grant or release their interest^a. According to the doctrine of Holt, C. J. in *Machil v. Clark*^a, it seems, that the releasee would in such a case have a *base fee*, not determined nor determinable till the entry of the issue: and of course his wife would be entitled to dower^b, and he would be dispunishable for waste^c. However, if a tenant in tail annexes a *warranty* to his release, that release and warranty will produce a discontinuance of the estate tail^d.

Here too we must distinguish between a release, which operates by *mitter le droit*, and a release by way of *enlargement*. The latter, we perceive, can neither produce a *disseisin* nor a *discontinuance*; but, with respect to the former, if a man seised in fee be disseised, and releases to the disseisor all his right in the lands so disseised, this release operates by *mitter le droit*, and completes the title of the releasee^e; for in this case the *possession* is in the releasee, and the *right* to the fee in the releasor; and the union of the right to the possession gives the releasee a *rightful* estate instead of the *wrongful* one, which he had before the release; and in this case the notoriety of the disseisin is equivalent to the li-

very^f.

As a lease and release only operates upon what the releasor may lawfully part with, it follows,

^a Litt. f. 606.
^b 98. 608.
^c 2 Salk. 619.

^b 3 Co. 84. b.
cited 24. E. 3.
38. b.
Plowd. 557.
^c 10 Co. 98. a.
supra.

^d Litt. f. 601.

^e Litt. f. 466.

^f Butl. note 1.
Co. Litt. 33b. a.

follows, that it cannot, when made by a tenant for life, pass or destroy any contingent estates limited after his estate for life. Therefore, if A. be tenant for life, with remainder to his first and other sons, and before the birth of any son A. conveys by lease and release to J. S. *in fee*, this conveyance, though made *in fee*, cannot destroy or divest any of the remainders in contingency; for it only transfers an estate *for life* to the releasee, which estate is capable of supporting the contingent limitations^e. So too, if a tenant for life, with a power *in gross* annexed to his estate, as a power to make a jointure on an after-taken wife, or a power to make leases to commence after his death, conveys by lease and release *in fee*, it does not destroy the power; for by the conveyance only his estate for life passed, and the execution of the power does not fall within the compass of the life estate^h.

^e 3 Will. 245.

^h Supra. 291, 292.

From the same principle we may likewise conclude, that if a tenant for life executes a lease and release to B. *in fee*, that act does not incur a forfeiture of his life interest: for a remainder-man or reversioner cannot enter, for a forfeiture, unless the tenant, by a tortious act, enlarges his particular estate: Now, by the lease and release, nothing but an estate for life passes, which he lawfully may transfer.

The conveyance by lease and release has been found more convenient than that of feoffment, because, to perfect a feoffment, there should be an actual entry by the feoffee, whereas the possession is executed in the releasee by the operation of the statute of uses, without

without the necessity of making such actual entry. So too, upon *exchanges*, the parties have no freehold in deed or in law in them, unless they execute the same by *entry*, and therefore, if one of the parties die before the exchange is completed by such entry, the exchange is entirely voidⁱ. But if such exchange be made by a lease and release, the trouble and inconvenience of an actual entry is avoided, for the statute executes the possession, and all the incidents to an exchange at the common law are preserved^k.

ⁱ Co. Litt. 50. b.
366. b.

^k Butl. note to
Co. Litt. under
fol. 276. a.

I shall present the reader with the form of a conveyance by lease and release to a purchaser, and his trustee, to bar the wife of the purchaser of her dower.

The Bargain and Sale, or Lease for a Year.

T H I S Indenture, made, &c. between George Gros, of in the county of Middlesex, esquire, of the one part; and Henry Howard, of gentleman, and John James, of the same place, linen-draper, of the other part; **Witnesseth**, That the said G. Gros, in consideration of five shillings of lawful money of Great Britain, to him in hand paid by the said H. Howard and John James, at or before the enfealing and delivery of these presents (the receipt whereof is hereby acknowledged) and for other good causes and valuable considerations the said G. Gros hereunto moving, **hath** bargained and sold, and

and by these presents **Doth** bargain and sell unto the said H. Howard and J. James, their executors, administrators, and assigns, all those the said messuages or tenements, lands, and hereditaments (*here the parcels should be described, as in the RELEASE*) together with all and singular the messuages, houses, out-houses, edifices, buildings, barns, dove-houses, stables, yards, gardens, orchards, lights, easements, ways, waters, watercourses, commons, commodities, privileges, emoluments, advantages, hereditaments, and appurtenances whatsoever, to the said messuages or tenements, lands, hereditaments, and premisses, belonging or in any wise appertaining, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or belonging to the same, or any part thereof, and the reversion and reversions, remainder and remainders, rents, issues, and profits of the said premisses, and of every part thereof, **To have and to hold** the said messuages, lands, tenements, hereditaments, and all and singular other the premisses hereinbefore mentioned, or intended to be hereby bargained and sold, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, unto the said H. Howard and J. James, their executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during, and unto the full end and term of one whole year from thence next ensuing, and fully to be complete and ended; yielding and paying therefore the yearly rent of one pepper-corn at the expiration of the said term, if the same shall

shall be lawfully demanded, to the intent and purpose that by virtue of these presents, and of the statute for transferring uses into possession, the said H. Howard and J. James may be in the actual possession of the same premisses, and thereby be enabled to accept and take a grant and release of the freehold, reversion, and inheritance of the same premisses, and of every part and parcel thereof, to the said H. Howard and J. James, their heirs and assigns, to the uses, and upon the trusts thereof to be declared by another indenture of three parts, already prepared, and intended to be dated the day next after the day of the date hereof. In witness whereof the parties hereto their hands and seals have set, the day and year first above written.

The release in fee.

This Indenture of three parts, made the day of *(to be dated the day after the day of the date of the bargain and sale for a year,)* &c. &c. **Between** George Gros, of in the county of Middlesex, esquire, of the first part; Henry Howard, of in the aforesaid county, gentleman, of the second part; and John James, of the same place, linen-draper (a trustee nominated by and on the behalf of the said H. Howard) of the third part. **Whereas** the said H. Howard hath contracted and agreed with the said G. Gros for the absolute

lute purchase of the messuages or tenements, lands, and hereditaments hereinafter mentioned to be hereby granted and released for the sum of £.3000, of lawful money of Great Britain: Now this Indenture witnesseth, That in pursuance of the said recited agreement, and in consideration of the sum of £.3000, of lawful money of Great Britain, Consideration. to the said G. Gros in hand well and truly paid, by the said H. Howard, at or before the sealing and delivery of these presents, the payment and receipt of which said sum of £.3000 (being in full for the absolute purchase of the said messuages or tenements, and hereditaments hereinafter mentioned, and hereinafter granted and released, or expressed or intended so to be) he the said George Gros doth hereby acknowledge, and thereof, and from the same, and of and from every part thereof, doth acquit, release, and discharge the said H. Howard, his heirs, executors, administrators, and assigns, and every of them, for ever, by these presents^a; and * Vide Supra, 376, respecting a receipt for the consideration money. also for and in consideration of five shillings of like lawful money, (A) at the same time

to

(A) It is usual to make a trustee pay five or ten shillings, or the like, which consideration, without any particular declaration of the use, would of itself carry it to him: however, if the use is expressly limited to him after the *habendum*, then there is no necessity for any further consideration, as we have already seen.

Grant and re-
lease.

Mention of the
bargain and sale
for a year.

to the said George Gros in hand paid by the said J. James (the receipt whereof is hereby acknowledged) he the said G. Gros at the request, and by the direction and appointment of the said H. Howard (testified by his being a party to, and sealing and delivering these presents) hath granted, bargained, sold, aliened, released, and confirmed, (B) and by these presents Doth grant, bargain, sell, alien, release, and confirm unto the said H. Howard and J. James (in their actual possession now being, by virtue of a bargain and sale to them thereof made by the said G. Gros for the term of one whole year, in consideration of five shillings to him paid by the said H. Howard and J. James, in and by one indenture, bearing date the day next before the day of the date hereof, and by force of the statute made for transferring uses into possession) and to their heirs and assigns, all those the said messuages, lands, &c. (*here the parcels should be particularized*) together with all the out-houses, edifices, buildings, barns,

-
- (B) The most proper, and significant words for a release, are *remise, release, and quit claim*, and are used by Littleton^a: however, there are other words, which will answer the purpose of a release^b. Therefore a release may operate by the words *grant, bargain, sell, assign, and confirm*, without either the words *remise, release, or quit claim*^c. Indeed the word *grant* alone may amount to a feoffment, grant, gift, lease, release, confirmation, or surrender^d.
- ^a Litt. f. 445.
^b Co. Litt. 264.
^c 1 Vent. 71.
^d Saund. 96.
S. C.
^e Co. Litt. 301.
b.

barns, dove-houses, stables, yards, gardens, orchards, lights, easements, ways, waters, watercourses, commons, commodities, privileges, emoluments, advantages, hereditaments, and appurtenances^b whatsoever, to the said messuages or tenements, lands, hereditaments, and premisses belonging, or in any wise appertaining, or accepted, reputed, taken, or known as part, parcel, or member thereof, or of any part thereof, and the reversion and reversions, remainder and remainders^c, yearly and other rents, issues, and profits of all and singular the said premisses, and also all the estate, right, title, interest, use, trust, property, possession, benefit, claim, and demand whatsoever, both at law and in equity, of him the said G. Gros, of, in, to, or out of the said messuages or tenements, lands, hereditaments, and premisses hereby granted and released, or expressed and intended so to be, and every of them, together with true and attested copies of all deeds, evidences, and writings comprized or mentioned in the schedule hereunder written, the first of such copies to be made, written, and delivered by and at the costs and charges of the said G. Gros, but the second and all future copies thereof to be made, written, or taken at the reasonable request, costs, and charges of the said H. Howard, his heirs or assigns; **To have and to hold** the said messuages or tenements, lands, hereditaments, and premisses hereby granted and released, or mentioned and intended so to be, and every part thereof, with the appurtenances, unto the said H. Howard and J. James, their heirs

^b Vide supra, 355, 356. 454. respecting such things as are appurtenant.

^c Supra, 455.

Habendum.

and assigns, (C) to the uses, and to and for the intents and purposes, and upon the trusts here-

(C) It is absolutely necessary to limit and ascertain the estate, which the releasee is intended to take; for a release in this respect has the same construction as a feoffment: therefore, if A. bargains and sells to J. S. for a year, and then releases to him, without expressing the release to be to him and *his heirs*, or the heirs of his body, &c. J. S. can in this case only take an estate *for life*, for want of sufficient words to convey to him the inheritance^b.

^a Litt. c. 465.

It may not be unacceptable in this place to offer a few observations on the different powers of the *premises* and the *habendum*, when both limit distinct estates, and in such limitation are both repugnant to and inconsistent with each other. The limitation of the estate of the grantee should be the same in the *premises* as in the *habendum*; and it is the deviation from this rule, which has given rise to many nice distinctions respecting their different operations. I shall therefore endeavour to point out a few rules, which we must observe in those cases, where the *premises* and the *habendum* differ in the limitation of the estate of the grantee.

First, then, it may be deemed an established rule, that where there is no estate expressed in the *premises* (in which case the law will adjudge the grantee to have an estate for life *by implication*) and there is an express estate limited

hereinafter expressed and declared of an
concerning the same; that is to say, to the

C c 2

use

limited by the *habendum*, there the *habendum* shall controul the *implied* estate created by the premises^f. Thus if lands or rent are granted to J. S. generally, *habendum* to him for years, or at will; here by the premises J. S. takes an implied estate for life, but the *habendum* abridges it into an express estate for years, or at will^g. In such a case, if the *habendum* is void (and therefore no *habendum*) yet the *implied* estate for life created by the premises shall not hold good against the express estate made by the *habendum*, though such express estate be altogether null and ineffectual. Therefore, if lands are given to A. generally by the premises, *habendum* after the death of the grantor to A. in fee, in tail, or for life, in this case the whole deed is void, for there can be no estate of freehold made to commence in futuro, and the *implied* estate for life in the premises cannot make it a grant to begin presently in possession^h. But then if there is an express estate limited to A. for life, or in fee by the premises, *habendum* after the death of the grantor to A. for life or in fee, in this case the *habendum* is void, and A. shall take a present estate by the premisesⁱ.

^f Co. Litt. 83.

^g

^h 8 Co. 154. b.

ⁱ 2 Co. 55. a. b.

Cro. Eliz. 254.

255.

Cro. Jac. 376.

¹ 3 Lev. 339.

Carter v.

Madgwick.

Vide 2 Roll. ab.

66. pl. 4.

Hob. 171.

Moor, 88. pl.

1236.

So it is a rule, that where there is an express estate limited in the premises, and an estate is created by the *habendum* in abridgment of, inconsistent with, and repugnant to the

use of such person or persons, for such estate and estates, interest and interests, and to and for

² 8 Co. 56. b.
² Co. 24. a.

¹ Dyer, 272. a.
pl. 30.
Hob. 171.

the estate limited in the *premises*, in such case the *premises* shall be good, and the *habendum* void. Thus if a man conveys lands to J. S. and *his heirs*, habendum to him *for life*, here J. S. has an estate *in fee* by the *premises*, and the habendum is entirely void ^k. So too if a man grants and assigns *all* of his term to A. habendum to him after the death of the grantor; in this case the habendum is wholly void, and the grantee shall have the term immediately ^l: for when the grantor disposes of *all* his term expressly in the *premises*, he manifests an intention of not reserving any part of it to himself, which intention could not be effected, if the grantee's interest was to take place after the death of the grantor.

However, we are to observe, with respect to this last rule, that whenever a ceremony or formality is requisite to the perfection of the estate, limited in the *premises* besides the delivery of the deed (such as livery of seisin), and no other ceremony is necessary to complete the estate limited by the habendum, than the mere delivery of the deed, in all such cases the habendum shall stand, and the *premises* be void. Thus if A. grants an estate to B. and *his heirs*, habendum to B. *for years*, here the habendum shall abridge the estate *in fee* given by the *premises* into an estate *for years* ^m. The reason of this construction

^m 2 Co. 24. a.

for such intents and purposes, and in such manner and form, as he the said H. Howard,
by

struction is, because by the delivery of the deed the estate for years limited by the habendum is perfected; whereas there is another process (viz. livery of seisin) required to vest the estate of freehold: so that when B. has the estate for years once vested in him, no *subsequent* ceremony can divest it out of him. This evidently depends upon the actual priority of the *delivery* of the deed to the *livery of seisin*: for if after the deed is delivered, livery of seisin is properly made, the livery and the feoffment will be reckoned as one entire act, and have *relation* to the *delivery* of the deed, as being all executed at one and the same timeⁿ. The same construction^a ^{2 Co. 75. a.} perhaps may be placed on a *bargain and sale*.^{5 Co. 79. b.} Thus if A. bargains and sells to B. and *his heirs, habendum* to him for years, here the *use* of the term of years vests in B. by the mere delivery of the deed, but to complete the bargain and sale of the freehold another ceremony is requisite, viz. an *inrolment*^o. Therefore the inrolment in this case, like livery^o ^{Supra, 434 to 441.} of seisin in the case of a feoffment, comes too late to divest the estate for years vested in B. by the delivery of the deed. But the reasons of this construction do not, I apprehend, apply to the conveyance of *lease and release*: for in the first place the part of this conveyance, which is denominated the *release*, is not properly suited to pass a term
of

by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by him in presence of, and attested by two or more credible witnesses, or by his last will and testament in writing, or any writing in the nature of and purporting to be his

¶ Vide
Co. Litt. 273. b.
Vide, as to a
surrender by
one termor to
another, Cro.
Eliz. 173. 302,
303.
1 Leon. 303.
322, 323.

of years: therefore if A. leases to B. for one year, and then releases to him for ten years, B. will indeed have an estate for eleven years, but then his prior estate for one year is not merged or consumed by the accession of the greater estate for ten years, but during the continuance of the one year he holds by virtue of the first lease, and not of the release: whereas, if in this case A. had released the freehold or inheritance to B. the lesser estate would be drowned in the greater, as we have already noticed. In the next place, if a man conveys by lease and release to B. *in fee, habendum* to him *for years*, here, as the *fee* as well as the *term of years* may vest in B. by the mere delivery of the deed (for by this conveyance the use and possession vest in the releasee without the ceremony either of *livery of seisin*, or *inrolment*); and as the law says, *that every grant shall be taken most strongly against the GRANTOR*, B. then will have an estate *in fee* by the *premises*, and the *habendum* will be void, according to the rule we have been just observing. So too upon the same principle, if one grants a rent *in esse*, or a *seignory* to J. S. and *his heirs, habendum* to him *for years, or for life*, although in this case

his last will and testament, or any codicil thereto, to be signed, sealed, and published by

case another ceremony was requisite besides the delivery of the deed, viz. *attornment*, yet as that ceremony was as necessary upon the grant of a rent *in esse*, or a seignory to create an estate for years or for life, as an estate *in fee*, the *habendum* in such a case is void and repugnant, and the premises shall stand ¹.

¹ 2 Co. 24. b.

This rule, which we have mentioned, viz. that where the *habendum* is repugnant to, or inconsistent with the *express* estate limited in the *premises*, the *habendum* is entirely void, was evidently established in favour of the grantee, and to the disadvantage of the grantor. Thus, in the case put above, where an estate is given to A. and *his heirs*, *habendum* to him *for life*; in this case, A. having an *express* estate in fee-simple given to him by the premises, the grantor is not permitted to take away that estate by the *habendum*, which he has already parted with by the *premises*, and thereby to abridge the limitation *in fee* to an estate *for life*. But the reasons of the above rule fail, whenever the grantee's interest is *enlarged* by the *habendum*, even where there is an *express* estate limited to him by the *premises*. Therefore what has been advanced concerning this rule may be corrected with this observation, that the *habendum*, when it is inconsistent with, and repugnant to the premises, can never *abridge* an *express* estate given

by him, in the presence of, and attested by three or more credible witnesses, shall direct, limit,

given by the latter to the grantee, whenever there is the same ceremony required to perfect the estate limited in the premises, and that created by the habendum; but that the *habendum* may *enlarge* the estate limited in the premises under similar circumstances. Thus if an estate is granted to A. *for life*, habendum to him *in fee*, here the same formality being requisite to create both estates, the habendum shall enlarge the estate *for life* into an estate *in fee* ^r.

^r Co. Litt. 299.
a.

It is clear also, that the above doctrine in favour of the grantee depends chiefly upon the inconsistency and repugnancy of the *habendum*. Thus, to put the same case again—an estate is given to A. and *his heirs*, habendum to him *for life*; this habendum is totally void, and A. has a fee-simple by the premises: for here the first estate is an estate of *inheritance*, whilst the estate by the habendum is only an estate *for life*: the habendum therefore is quite inconsistent with, and repugnant to the premises. But though the grantor is not allowed entirely to *alter* the estate of the grantee, yet he is suffered to *qualify* it, if there be no inconsistency in so doing. Therefore, if a man grants lands to another and *his heirs*, habendum to him and *the heirs of his body*, in such a case the habendum qualifies the premises, and the grantee has an *estate tail*,

limit, or appoint, and in default of, and until such direction, limitation, or appointment, to the use of the said H. Howard and J. James, and the heirs and assigns of the said J. James

tail, with a fee-simple expectant thereon: for the word *heirs* is an extensive word, and may relate to heirs *special*, as well as *general*, and the grantor by the habendum signifies what heirs he intended to describe. Upon the same principle, if a conveyance is made to A. and *his heirs*, habendum to him during the lives of B. C. and D. here the word *heirs* in the premises is as applicable to a *descendible* estate of freehold, as to a *fee-simple*, and therefore the habendum explains the premises, and gives the grantee an estate of freehold descendible to his heirs during the lives of B. C. and D.: So too if lands are granted to A. and the *heirs of his body*, habendum to him *in fee*, A. has by the premises an estate tail, and by the habendum a fee-simple expectant thereon.

The *habendum* is sometimes used to explain the *nature* of the estates, which the *grantees* are intended to take. Thus if a feoffment be made to A. and B. of *twenty* acres, habendum as to the one moiety to A. habendum as to the other moiety to B.; here by the premises A. and B. have a *joint* estate, and by the habendum they are tenants *in common*, and yet the habendum is good: for the habendum is not repugnant to the premises, because it makes no division of that undivided

22f.

* Co. Litt. 21.
2.
Cro. Jac. 476.
Sed contra, as
to the fee ex-
pectant thereon
Perk. f. 170.
8 Co. 154. b.
Moor, 26.

* T Jones, 4.

* 8 Co. 154. b.

* Co. Litt. 83.
b.
190. b.

J. James for ever, in trust nevertheless, as to the estate and interest so hereby limited in use to the said J. James, his heirs and assigns, for and for the only benefit of the said H. Howard, his heirs and assigns for ever, and to be conveyed and disposed of from time to time as he the said H. Howard, his heirs or assigns, shall direct or appoint, and to, for, and upon no other use, trust, intent, or pur-

possession, which is given by the latter. However, if the premises limit twenty acres to A. and B.; and the habendum expressly gives ten acres to A. and the other ten acres to B. the habendum is entirely void; for it makes an express division of the acres, which is inconsistent with the undivided possession limited by the premises *.

* 1 P. W. 19.

7 2 Co' 55. b.
Co Litt. 183. a.
b.
3 Roll. ab. 65.

So too if a lease be made to two, habendum to the one for life, remainder to the other for life, this habendum is good †. But then the habendum, when it explains the nature of the grant, and the manner of succession, should be very clear in such explanation: for where there was a grant to A, habendum to him, B. and C. *pro termino vite eorum, et alterius eorum successive, diutius viventium*, the habendum was held to be void: for neither B. nor C. could take any thing as lessees in possession, because they were not parties to the deed, nor were they named in the premises; nor could they take *jointly* by way of remainder, because the limitation was

purpose whatsoever (D): And the said G.

Gros for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said H. Howard and J. James, their heirs and assigns, and to and with each and every of them, in manner following, (that is to say) That for and notwithstanding any act, deed, matter,

Covenant that the Grantor is seised in fee.

to them *successive*; neither could they take in *succession*, because it did not appear who should take first ².

(D) A woman cannot claim her dower out of a *trust* estate ³, nor out of such lands as her husband holds *jointly* with another ⁴.

² Hob. 313.
Windimore v.
Hobart.

³ Supra, 250.

⁴ Litt. c. 45.

As a mode to prevent dower, it is sometimes the practice to limit the estate to such uses as a person shall appoint, and in the mean time, and until he makes an appointment, to the use of himself and his heirs; in this case, the person to whom the power is reserved has a qualified and determinable fee, until he exercises the power of appointment; and if he dies without appointing any uses under the power (whereby the exercise of it becomes impossible) his wife is clearly entitled to her dower out of such fee. But if he exercises this power of appointment, a new use springs up to the appointee, which use takes precedence of all the uses limited in default of the appointment, and of course

matter, or thing whatsoever, made, done, executed, committed, occasioned, or suffered by him the said G. Gros, or any of his ancestors, to the contrary, he the said G. Gros is, at the time of the sealing and delivery of these presents, lawfully, rightfully, and absolutely seised of and in, and well and sufficiently entitled to the said messuages or tenements, lands, hereditaments, and premisses hereby granted and released, or intended

course it bars the right of the wife to her dower; because when the use is vested in the appointee, it has the same effect as if it had been originally limited to him by the first deed, and not by the power. In this case it must be observed, that, as the existence of the power is the only thing which can prevent the wife from claiming her dower, and, as a power of appointment is liable to be suspended and destroyed, there must, in such a case, be always a possibility of danger in accepting of a title which wholly depends upon it^a.

^a Butl. note 2.
Co. Litt. 216. a.

Mr. Butler, in his very learned annotations on Coke upon Littleton, has expressed himself so fully on the different manners of preventing dower, that any further investigation of that subject seems almost unnecessary.

^b Co. Litt. under fol. 381. b.

He observes in one of his notes^b, that the modes of limiting an estate to the purchaser and his trustee, and the heirs of the trustee, but in trust for the purchaser, or immediately to the trustee and his heirs, in trust for the

pur :

tended or expressed so to be, with the appurtenances, of and in a good, sure, perfect, lawful, absolute, and indefeasible estate of inheritance in fee simple, without any manner of condition, contingent proviso, power of revocation^b, or limitation of any new or other use or uses, or any other matter, restraint, cause, or thing whatsoever, to alter, change, charge, revoke, make void, lessen, incumber, or determine the same, and that for and notwithstanding any such act, matter,

^b Vide 27 Eliz. c. 4. f. 5.
Vide also Hill. Shep. T. 61, 62, 63.

That he has full power to sell.

or

purchaser and his heirs, are objectionable, because they keep the *legal* fee from the purchaser, and subject him to the inconvenience of its becoming vested in infants, married women, and persons residing at a distance, or of its escheating to the crown in default of heirs of the trustee: or because the trust estate may be considered to pass in the general devise of the trustee's will, and thereby become settled at law to uses in strict settlement, and therefore not to be regained but by fine or recovery, and until the existence of a tenant in tail, not be regained without the aid of parliament. To prevent these inconveniences attending the legal fee outstanding in a trustee, Mr. Butler has properly suggested, that the estate should be first limited to such uses as the purchaser shall appoint; and, for want of such appointment, to the use of a trustee, his heirs and assigns, during the life of the purchaser, in trust for him, and subject thereto to the

Vide *supra*. 234

or thing, as aforesaid, he the said G. Gros hath in himself good right, full power, and lawful and absolute authority to grant, bargain, sell, alien, release, convey, and assure the said messuages or tenements, lands, hereditaments, and premisses, hereby granted and released, or expressed and intended so to

the use of the purchaser, his heirs and assigns. By this means the wife will be barred of her dower; the purchaser have the absolute command of the *legal* estate in fee during his life by virtue of the power; and at his death the use will vest in his heir.

To prevent the estate of the trustee in the above instance from vesting in an infant heir, *feme covert*, &c. Mr. Butler further observes, that the estate of the trustee may be limited to the trustee; his *executors*, *administrators*, and *assigns*, during the life of the purchaser. This will not prevent its being an estate of freehold in the hands of the executor or administrator.

• Vide index to the notes of Co. Litt.

Also 3 Atk. 466.

• 3 Lev. 437.

• Vide note to 1 Fearn, 509 edit. 4th.

In consequence of the principle laid down in the case of *Duncomb v. Duncomb*^d, Mr. Fearn has proposed another mode of preventing dower's attaching upon purchased lands^e. For this purpose the lands may be limited to such uses as the purchaser shall appoint, and in default of appointment, to the use of him and his assigns during *his life*; and from and after the determination of that estate, by any means in his life-time, to the use of some person and his heirs during the natural

to be, and every part thereof, with the appurtenances, unto the said H. Howard and J. James, their heirs and assigns, to the uses, and to and for the intents and purposes, and upon the trusts hereinbefore expressed and declared of and concerning the same; according to the true intent and meaning of these presents; **and also** that the said messuages or tenements, lands, hereditaments, and premises, hereby granted and released, or expressed and intended so to be, and every part thereof, with the appurtenances, shall from time to time, and at all times hereafter, remain,

That the grantee may peaceably enjoy, &c.

natural life of the purchaser, in trust for him and his assigns; and from and after the determination of the estate so limited to the life of the said trustee and his heirs, to the use of the purchaser, his heirs and assigns, for ever. Here the *intervening* estate to the trustee will defeat the right of the purchaser's wife to dower, according to the determination in the said case of *Duncomb v. Duncomb*; and the whole estate will be completely in the purchaser's power, without any recourse to the trustee.

Sometimes an estate is limited to a trustee, and the purchaser, and their heirs; but as to the estate of the trustee and his heirs in trust for the purchaser and his heirs: but this mode exposes the purchaser to the chance of the trustee's dying in his life-time; in which case the wife's right to dower would attach upon the estate^f.

^f Butl. note
Co. Litt. under
fol. 381. b.

That the lands
are free from
incumbrances.

main, continue, and be unto the said H. Howard and J. James, their heirs and assigns, to the uses, and to and for the intents and purposes, and upon the trusts hereinbefore expressed and declared of and concerning the same, and shall and may be peaceably and quietly had, held, and enjoyed, and the rents, issues, and profits thereof, and of every part thereof, from Midsummer Day now last past, received and taken accordingly, without any let, suit, trouble, denial, eviction, ejection, interruption, or disturbance of, from, or by the said G. Gross or his heirs, or by any other person or persons lawfully or equitably claiming or to claim by, from, through, under, or in trust for him or them, or by, from, through, or under any of his ancestors; and that the said messuages or tenements, lands, hereditaments, and premises, are free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise, by him the said G. Gross, his heirs, executors, and administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, and all right and title of dower, uses, trusts, wills, intails, statutes merchant and of the staple, recognizances, judgments, extents, executions, annuities, legacies, payments, rents and arrears of rent, forfeitures, re-entries, cause and causes of forfeiture and re-entry, and of, from, and against all and singular other estates, titles, troubles, charges, and incumbrances whatsoever,

soever, had, made, done, committed, executed, occasioned, or suffered by him the said G. Gros, or by any other person or persons lawfully or equitably claiming or to claim by, from, through, under, or in trust for him, or by, from, through, or under any of his ancestors^a (except the now residue of a term of 1000 years hereinafter mentioned, and except &c. &c. (E). And moreover,

D d

that

^a Note, when a person conveys to a purchaser an estate, which he has by *descent*, it is usual for him to covenant not only against his own acts, but those of his *ancestors*: but if he himself takes the estate by way of *purchase*, then it is but reasonable, that he should only covenant against his *own* acts, especially as his purchaser will take advantage of all such prior covenants as run with the lands, and of which he might take advantage.

(E) The grantor covenants, 1st, That notwithstanding any act by him or his ancestors, he is seised *in fee*. 2dly, That notwithstanding any such act, he has a good right to grant, &c. 3dly, That the grantee may peaceably enjoy the premises without any interruption, &c. by the grantor, or by any other person or persons claiming by or under him or his ancestors. 4thly, That the premises are free from incumbrances, &c. occasioned by him, or any claiming under him, or his ancestors. All of these are *distinct*, and *different* covenants, and do not form one *entire* sentence.

In the case of *Nervin v. Muns*^g, a ^g 3 Lev. 46. grantor covenanted, 1st, That notwithstanding any act done by him to the contrary, he was seised in fee-simple, &c. 2dly, That he had a good power and lawful authority to sell. 3dly, That the lands were free from any incumbrances made by him or his grandfather. 4thly, That the grantee should enjoy against all persons claiming under him, his father, or his grandfather. The question was,

Covenant for
further assu-
rance.

that he the said G. Gros and his heirs, and all and every other person or persons, having, or lawfully or equitably, or who shall or may have, or lawfully or equitably claim any estate, right, title, trust, or interest of, in, to, or out of the said messuages or tenements, lands, hereditaments, and premisses hereby granted and released, or expressed and intended so to be, or any part thereof, by, from, through, under, or in trust for him or them, or by, from, through, or under any of his ancestors, from time to time, and at all times or time hereafter, upon every reasonable request, and at the proper costs and charges in the

was, whether the words in the first covenant, *notwithstanding any act done by HIM*, extended to the *second* covenant? For if they did, then there was no breach of covenant. It was admitted by the whole court, that all these covenants were *several* and *distinct*; and three of the judges held, against the opinion of North, C. J. that though these covenants were *distinct*, yet the two first were synonymous and of the same nature, for if a man was seised in fee, he certainly had a good right and full power to sell; and it could not be intended, that when the grantor covenanted against his own acts, that he should immediately after, by a covenant of the same nature, covenant against the acts of the whole world.

Upon the authority of this case then we may venture to lay it down as a rule, that
where

the law of the said H. Howard, his heirs and assigns, or of the said J. James, his heirs or assigns, make, do, acknowledge, levy, suffer, execute, or cause or procure to be made, done, acknowledged, levied, suffered, and executed, all and every such farther lawful and reasonable acts, deeds, and things, devices, and conveyances, and assurances in the law whatsoever, for the further, better,

D d 2

more

where two covenants are synonymous, though at the same time *several* and *distinct*, the restrictive words at the beginning or end of the *first* covenant will extend to the *second*. It is however very clear, that where covenants are *distinct* and *several*, and at the same time are of *different natures*; and concern *different things*, there restrictive words in one covenant will not qualify or restrain the generality of the other. This point is clearly explained in the case of *Gainsford v. Griffith*^h, where a lessor h 1 *Saund. 58.* covenanted that the lease in question was a 2 *Keb. 201. 213.* good, certain, and indefeasible lease in the 1 *Sid. 328.* law, and should so remain for the residue of the term; and that the lessee should quietly and peaceably enjoy and hold the premises during the term, without the lawful let, suit, trouble, or interruption of the lessor, his executors or administrators, and that the lessee should be saved harmless, and indemnified from all incumbrances, made, committed, suffered, or done *by the lessor*: the question was, whether the restrictive words at the end of the last covenant qualified and explained the

more perfectly and absolutely granting, releasing, conveying, assuring, and confirming the said messuages or tenements, lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, and every part thereof, with the appurtenances, unto the said H. Howard and J. James, their heirs and assigns, to the uses, and to and for the intents and purposes, and upon

the first? and it was held, that they were distinct sentences, and of different natures; and therefore the words at the end of the last sentence, which qualified the covenant against incumbrances to such incumbrances as were committed by the lessor, could not extend to the former covenant; that the lease was a good indefeasible lease, &c.

ⁱ Cro. Car. 106.
Crayford v.
Crayford.

So ⁱ, where a man covenanted that he was seised of a certain manor in fee, notwithstanding any act done by him or any of his ancestors; and that no reversion or remainder was in the king or any other; and that the said manor was of the annual value of £.300 per annum: it was held, that these covenants were absolute and distinct, and that the restrictive words in the first covenant could not qualify the last sentence respecting the value. The same point was determined in the case of Hughes v. Bennet ^k.

^k Cro. Car. 495.

However, where several sentences make but *one entire* covenant, there restrictive words in one sentence may be extended to, and qualify the other sentences, provided the sense

upon the trust hereinbefore expressed and declared of and concerning the same, or otherwise as he the said H. Howard, his heirs or assigns, shall direct or appoint, be the same by fine, feoffment, common recovery, deed enrolled or not enrolled, or any other matter of record or not of record, or otherwise howsoever, as by the said H. Howard and J. James, their heirs or assigns, either
or

sense will admit of it. Thus^l, where a termor assigned his term, and covenanted that *he* had not made any grant, or done any thing, by means whereof the grant or assignment could in any manner be impaired, hindered, or frustrated, *but that* the assignee should enjoy without any impediment or disturbance by him *or any other person*: it was held, that this was but one sentence, and that the exprefs restrictive words in the beginning of the covenant restrained and qualified the generality of the subsequent words, *by any other person*.

^l Dyer, 240. a.
b. pl. 43.
Vide Gervie 72
Peade, Cro.
Eliz. 615.

In the case of *Trenchard v. Hoskins*^m, a grantor covenanted that he was seised in fee, ^{^m Litt. Rep. 62. to 69. 203 19} and that he had a good and lawful authority to sell, *and* that there was no reversion or remainder in the crown *notwithstanding any act done by him*. The question was, whether these last restrictive words explained the preceding covenants, that he was seised in fee, &c.? It was determined in the common pleas, that these were three distinct and several covenants, and therefore the restrictive
words

or any of them, or their or any of their counsel learned in the law, shall be reasonably advised, or devised and required, so as no such further assurance or assurances contain or imply any further or other warranty or covenant than against the person or persons who shall be required to make and execute the same, and his, her, or their respective heirs, executors, and administrators
acts

2 Keb. 201.

1 Sid. 328.

words in the last sentence could not extend to the first. But, upon a writ of error in the king's bench, this judgment was reversedⁿ, though that reversal was never entered^o. The opinion of the court of king's bench, that the three sentences in the above case made but *one* entire covenant, seems to be over-ruled by the later decision in the before-cited case of *Nervin v. Muns*^p.

Supra, 518.

1 Saund. 62.

It was laid down as a rule in the case of *Gainsforth v. Griffith*^q, that a general *express* covenant cannot be altered or qualified by another express subsequent covenant, unless such subsequent covenant is construed to be a part of the former covenant, and both of them be reckoned as one entire sentence. However, in some cases, an *express* subsequent covenant may qualify and restrain the operation of a preceding *implied* covenant. Thus, any express covenant on the part of a grantor will qualify the generality of the implied covenant or warranty produced by the word *grant*, when that word is used to pass a *chattel interest*; for it seems, with respect to a
freehold

acts and deeds only, and so as the person or persons who shall be required to make and execute any such further assurance or assurances be not compelled or compellable, for the making or doing thereof, to go or travel from his, her, or their then respective dwelling or dwellings, or usual place or places of abode or residence ^a. And whereas, by in-

denture of assignment, bearing date on or about the day of this present month of and made or expressed to be

made between A. Andrews, of of the first part, B. Bell, of of the second part, the said G. Gros of the third part, C. Casey, of esquire, of

the fourth part, and D. Davy of the fifth part, a certain term of 1000 years devised, limited, or created of and in the said herein-before mentioned premisses, and divers other hereditaments in and by the last will of the late

^a Vide as to covenants for further assurance, *supra*, 401, 402, 403.

Recital of a term of 1000 years being assigned to a trustee.

freehold or inheritance, that *that* word does not import any warranty or implied covenant ^r.

It must be observed, that, in grants of estates of *freehold*, the word *give* creates an implied warranty, the generality of which implied warranty cannot be controuled by any express covenant; and if there be such implied warranty, and also an express covenant, the

grantee may use which of them he pleases ^a. So, if a man makes a lease for years, rendering rent, and adds an express warranty, here the express warranty does not take away the warranty in law, for the lessee has his election to vouch by force of either of them ^t.

^r Butl. note 1. Co. Litt. 384. a. Vaugh. 126. 4 Co. 80. b. Noke's case. Perk. f. 124.

^a Co. Litt. 384. Litt. Rep. 64.

^t 4 Co. 81. a; Co. Litt. 384. a.

late T. Gros (the late father of the said G. Gros), and such of the said hereditaments and premisses comprised in the said term as are hereinbefore granted and released, or expressed or intended so to be, were and now stand assigned to the said C. Casey, his executors, administrators, and assigns, **in trust** for the said G. Gros, his heirs and assigns, or such purchaser or purchasers, or other person or persons, to whom the same several hereditaments, or the freehold, reversion, and inheritance thereof, are, or from time to time should be conveyed or assured, and to be assigned, surrendered, or otherwise disposed of, as he or they respectively, or his or their respective heirs or assigns, should, as to their respective parts of the same premisses, direct or appoint, and in the mean time **in trust** to attend the inheritance of the same premisses, as by the said indenture (reference being thereunto had) will more fully appear :

Declaration
that the trustee
shall stand pos-
sessed of the
term, to attend
and protect the
inheritance
from mesne in-
cumbrances.

Now this indenture further witnesseth, and for the considerations hereinbefore expressed it is hereby declared and agreed, by and between all the said parties to these presents, and particularly the said G. Gros, for himself, his heirs, executors, and administrators, doth hereby declare and direct, That the said C. Casey shall and do from henceforth stand possessed of and interested in the said messuages or tenements, lands, hereditaments, and premisses, hereby granted and released, or mentioned and intended so to be, or all such part or parts thereof as are or were assigned to him by the said recited indenture, with the appurtenances, for all the

now

now residue of the same term, in trust for the said H. Howard, his heirs and assigns, and to assign, surrender, and dispose of the same from time to time, as they shall direct or appoint, and in the mean time, and subject thereto, in trust to attend, wait upon, and go along with the freehold, reversion, and inheritance of the same premises hereby granted and released, or expressed and intended so to be, in order to protect and preserve the same from all mesne charges and incumbrances (if any such there be). (F) And whereas the several title deeds and writings relating to the said hereditaments and premises do concern the title not only of all the said estates and hereditaments hereby granted and released, or expressed and intended so to be, but also of divers other estates and hereditaments, of or belonging to the said G. Gros, situate and being in the said county of Middlesex, and in other counties in England: and therefore it hath been agreed, that the same several deeds, evidences, and writings, in the schedule hereunder written mentioned and particularized, should remain in the custody and possession of him the said G. Gros, his heirs and assigns, upon his entering into covenants to and with the said H. Howard and J. James, to produce the same evidences, deeds, and writings, and to make, or permit copies to be made

(F) With respect to the utility of terms to attend the inheritance, I shall refer to Mr. Butler's note to Coke upon Littleton, under fol. 292. b. 293. a. b. 294. a. b.

Covenant to
produce title
deeds,

made thereof, when thereunto required, in order to evidence and support their respective titles thereto: **And therefore this Indenture further witnesseth,** That in pursuance of the said last-mentioned agreement as to the hereby released premisses, and for the consideration hereinbefore expressed, he the said G. Gros for himself, his heirs, executors, and administrators, **Doth** hereby further covenant, promise, and agree, to and with the said H. Howard, and J. James, their heirs and assigns, and to and with each and every of them, that he the said G. Gros, his heirs, executors, administrators, or assigns shall and will from time to time, and at all or any times or time hereafter, upon every reasonable request, and notice thereof in writing, for that purpose given to him the said G. Gros, his heirs, executors, administrators, or assigns, or some, or one of them, by the said H. Howard, and J. James, their heirs or assigns, or either, or any of them, at the costs and charges of the person or persons requiring, or desiring the same, produce and shew forth, or cause to be produced and shewn forth to them, or either, or any of them, or to such person or persons, as they, or any of them, shall direct, desire, or require, or at any trial, hearing, or examination in any court of law or equity, or other judicature, or upon the execution of any commission in England, or elsewhere as occasion shall be, or require, the several deeds, evidences, and writings of, or relating to, or concerning the title of the said messuages or tenements, lands, hereditaments, and premisses hereby granted, and

released, or expressed and intended so to be, mentioned in the schedule thereof hereunder written, or hereunto annexed, and every or any of them, and make, and deliver, or cause and procure, or permit and suffer, copies to be taken thereof for the manifestation, defence, and support of the estate, right, title, interest, property, or possession of the said H. Howard, and J. James, their heirs and assigns, or either of them, of, in, or to, all or any part of the said messuages, or tenements, lands, hereditaments, and premisses hereby granted, and released, or expressed, and intended so to be, with the appurtenances, unless the said G. Gros, his heirs, executors, administrators, or assigns shall be prevented, or hindered from so doing by casualties, or fire or other inevitable accidents. In witness, &c.

At

AN APPOINTMENT.

WE must distinguish between the technical meaning of an appointment, and a declaration of a use. The latter is that original disposition of the use by the express consent of the parties, which prevents its following any implied designation, which the rules of the law might otherwise prescribe: but the true import of the former seems to be, where a person makes a conveyance to such uses as the appointor shall by any future deed, &c. direct and appoint, and in default of, and until such appointment to the use of such and such particular persons; or it is, where uses are first limited on the conveyance, and then a power is reserved to some particular person to limit other uses; such are the powers of leasing, making jointures, selling, exchanging, and charging. Considering an appointment as taking effect in either of those senses, I shall make a few *general* observations on its nature and operation.

As

As a power of appointment is but the limitation of a use, it follows that it cannot be considered as an *independent* conveyance of the possession or estate. Therefore, if a person, in pursuance of a power of appointment, limits an estate to A. to the use of B. here as the use is first limited to A. *that* use can only be executed by the statute, and consequently the use limited to B. is void as a *use*, upon the principle that no use can be limited upon a use; but this limitation to B. is good as a *trust* ^a.

^a Butl. note.
Co. Litt. under
fol. 276. b.

With respect to this observation, we must make a distinction, where, subject to the execution of the power, the whole *legal fee* is vested in the person or persons, to whom such power is reserved, and where the power of appointment is limited to one, who has *not* the legal fee subject thereto: for in the former case it seems, that the person to whom it is given, may either make a disposition of the *use* by virtue of the power, or he may make a conveyance or devise of the *land* itself, as being the *legal* owner thereof. Thus if A. makes a feoffment, levies a fine, suffers a recovery, or conveys by lease and release to B. and his heirs, to such uses as A. shall by deed or will appoint, and in default of such appointment, to the use of A. in fee (or indeed the use would result to the feoffor, &c. until the appointment without any express declaration) here A. may make an appointment, or he may dispose of the *land* as the legal possessor ^b. In this case if the feoffor, &c. makes his will, and *without reciting* to or reciting the power, devises the land

^b Co. Litt. 111.
b. 112. a.
6 Co. 18. a.

^b Ibid.

land generally, it takes effect as a devise of the land itself, and not as a disposition of the use ^c. Lord Coke, indeed, makes a distinction between a feoffment to *such uses as the feoffor shall by his last will appoint*, and to the *use of the feoffor's last will*; for with respect to the latter he says, that if the feoffor makes his will *with reference* to the power, yet it shall take effect by virtue of the *devise*, and not as a limitation of the use ^d.

^a Har. Co. Litt.
312. 2 note 2.
Moor. 280.

However, if a power of appointment is reserved to a person, who is not the legal owner of the fee, he can only make a limitation of the use in pursuance of the power, and can make no conveyance of the possession, as having the legal estate: such are the powers reserved in marriage settlements to feoffees, releasees, &c. to sell and exchange. In these cases when the feoffees exercise the power, whatever words they make use of, whether *grant, bargain, sell, &c.* they can only operate as a limitation of the use ^e. When powers are reserved to persons of this description, if in the exercise of them they convey by lease and release, bargain and sale, &c. or in other words, if they convey like owners of the land, rather than by virtue of the power, the conveyance shall nevertheless operate as a disposition of the use under the power reserved to them. All this is explained in a very instructive argument of Mr. Peere Williams, in the case of *Tomlinson v. Dighton* ^f. The case there was to this effect; A. devised lands to B. for her life, with a power to dispose of the fee to any of her children. B. conveyed by *lease and release* to the use of her

^e Bufl. note.
Co. Litt. under
fol. 276. b.

^f 1 P. W. 149.
1 Salk. 239.

herself for life, remainder to the use of her daughter C. in tail, remainder to the use of W. in fee: the question was, whether this conveyance was a good execution of the power? In this case B. was only the legal owner of a life estate; therefore the objection was, that B. conveying by *lease and release in fee*, shewed that she intended to convey as owner of the estate, and not as executing a power. But it was held, that the lease and release was an *effectual*, though an *improper* execution of the power.

There is a case, which may occasionally happen, wherein most of the foregoing observations may be applied. Suppose a recovery to be suffered to the use of A. for life, remainder to such uses as A. and B. shall jointly appoint, and for want of such appointment, to the use of B. in fee. Here A. has the legal estate in him for life *absolutely*, and the legal estate or use is executed in B. in fee by the statute, subject however to be defeated, postponed, and abridged by the execution of the power. Now as A. has an absolute estate for life, and B. the remainder in fee, subject to the power, both of them by joining in a lease and release without *referring to* or *reciting* the power, may, according to their respective estates, convey an estate in fee to the releasee as legal owners of the land, and not by virtue of the power. But on the other hand, if they, *reciting the power*, and in *exercise thereof*, convey by *lease and release* to C. in fee, to the use of D. in fee, it seems by the better opinion, that this conveyance by lease and release does not operate as an assurance

furance of the land itself, but merely as a limitation of the use in pursuance of the power; consequently the subsequent limitation of the use to D. cannot be executed by the statute, upon the principle so often cited, viz. that a use cannot be limited upon a use; but D. takes an equitable fee. For in this case, when the parties *recite* the power, and *in pursuance thereof* make the conveyance, it shewed, that they intended to limit the use in exercise of the power, and not to make an *independent* conveyance, as owners of the land. The lease and release in this case appears to have a very peculiar operation; for as it operates in the first place as an *appointment*, it previously transfers or vests the *remainder* of the use in fee after A.'s estate for life in C. and then the statute executes the possession to him out of the original seisin of the recoveror. Now though the lease and release convey the legal estate in fee in remainder to C. in pursuance and by virtue of the *power*, yet it also has another effect, for by force of its true and original operation, it conveys the legal estate of A. for life, which is *not subject to the power*. Therefore, when the life estate, and the remainder in fee, are united in one and the same person, the estate for life, which passed by the lease and release, is merged and extinguished in the remainder in fee, which passed to C. by way of limitation or appointment of the *use*: by this means C. becomes seised of the whole use or legal estate in fee-simple, which use or legal estate can not be drawn from him by

by any subsequent declaration of the use to D.

By virtue of a power of appointment, a person may, in *a certain degree*, effectuate a remote limitation, which, if placed in the original deed, would be considered as tending to a perpetuity, and therefore void. Thus if there be a limitation to one for life, who at that time has no son, with a *general* power reserved to B. to limit the uses in remainder to such and such persons (without particularizing any set of persons) as B. shall appoint; here upon the birth of a son of the tenant for life, the use may be limited to such first son *for life*, remainder to his first and other sons in strict settlement, notwithstanding the persons to whom the estates are appointed were not in existence at the time of the execution of the conveyance, in which the power is contained ^e. But if the power is *restrained* to the *particular* sons of the tenant for life, it is void: therefore when the great duke of Marlborough gave a power to trustees by his will, on the birth of the sons of the tenants for life therein named, to revoke the uses limited to those sons *in tail*, and to limit the uses to such first sons *for life*, remainder to the first and other sons of such first sons severally and successively in tail male; it was held, that this power, as tending to a perpetuity, was void ^h.

It is generally true, that a use limited by virtue of a power of appointment, has relation to the conveyance, wherein the power is contained. Therefore, if an estate is limited to the use of such and such persons, as a purchaser

^e Butl. note.
Co. Litt. under
fol. 381. a. b.
vide
Robinson v.
Hardcastle.
² Brown. Cha.
Rep. 22.

^h 5 Brown.
P. C. 592.

chaser shall appoint, and in default of appointment to the use of the purchaser and his heirs; now until the purchaser exercises the power, he is seised of a base and qualified fee, liable to be defeated by the execution of the power; and if he dies without making any appointment, his wife will be clearly entitled to her dower; but if he exercises his power, then a new use springs up, which entirely defeats the intermediate use limited in default of the appointment, and of course destroys the wife's right to dowerⁱ. So if an estate be conveyed to the use of A. for life, with many remainders over, and a power is reserved to A. to make leases, or a jointure upon an after-taken wife, here when A. exercises his power, it takes effect by way of limitation of a use, which entirely overreaches and takes precedence of the other uses^k.

ⁱ Butl. note.
Co. Litt. under
fol. 216. b. 217.
a. 381. b.

^k 1 P. W. 246.
vide 2 P. W.
66a.

Upon the same principle, if there be a limitation of a use to A. for life, and after his decease to such uses as B. shall appoint, who afterwards in A.'s lifetime appoints the use to the right heirs of A.; in this case it seems, that the limitation of the use to the right heirs of A. by virtue of the appointment, unites with the life estate of A. so as to make the right heirs take by *descent*, and not by way of a contingent remainder^l, because the use, limited under the power, operates as a use created by, and arising under the original conveyance. In cases like this, care should be taken to appoint the use immediately to the right heirs; therefore, if the limitation be to A. for life, and after his decease to such uses

^l Vide Fearn, 99. 100. edit. 4.
Butl. note 1.
Co. Litt. 299.

uses as B. shall appoint, and B. makes an appointment to C. in fee, to the use of the right heirs of A. ; here the legal estate or use is vested in C. by the appointment, and the right heirs of A. take only an *equitable* estate or *trust*; therefore, as the *legal* estate for life of A. cannot incorporate with the *equitable* estate limited to his right heirs, A. cannot take an estate of *inheritance*, but merely a life estate with a *contingent remainder* to his right heirs^m. Upon the same principle and for the same reasons, if an estate is limited to A. for life, remainder to trustees and *their heirs* (omitting the words, *during the life of A.*) to preserve contingent remainders, remainder to such uses as B. shall by deed or will appoint. Now in this case, the limitation to the trustees and their heirs, after the determination of A's. estate for life, not being *confined* (as is usual) to the lifetime of A. gives them the whole *legal* remainder in fee-simple expectant on the decease of A. and consequently if B. makes an appointment in pursuance of the power to the right heirs of A. this is not a limitation of a *use* executed by the statute, but merely *trust* or *equitable* estate; of course the limitation to the right heirs of A. cannot incorporate with the previous estate limited to him for life.

In some cases, however, an appointment does not relate back in point of time to the instrument by which it is created. Thus in the case of the Duke of Marlborough v. Lord Godolphinⁿ, where Lord Sunderland by his will gave the interest of £.30,000 to his wife during her life, and after her decease, the

^m Vide: Fearn, 77. 78. 79.
1 Eq. ab. 383.
pl. 4.
ⁿ 8 Vin. ab. 66.
pl. 19.

ⁿ 2 Vesey, 61.

principal to be distributed among such of his children, and in such manner and proportion as she by any deed or will, or instrument or writing in nature of a will, should direct and appoint. By her will reciting the power, she gave £.15,000 to Lady Morpeth, and £.2,000 to Mr. Spencer, who both died in the life-time of the testatrix: the question was, whether the appointment had a relation back to the time of the death of Lord Sunderland, when the instrument, which created the power, took effect, so as such relation should over-reach the death of the two parties who were alive at the death of Lord Sunderland the testator; according to which construction, the legacies would be considered as *vesting* in them during their lives? But Lord Hardwicke held, that nothing vested in them during their lives, and consequently nothing was transmissible to their representatives; because every person claiming under the execution of a power, must claim not only according to the execution of the power, but the *nature* of the *instrument* by which that power is executed; and therefore a *will* in execution of such a power being always *revocable*, if it be taken as the execution of a power generally, and not as a *will*, or instrument in *nature* of a *will*, then is it irrevocable; but so long as it is called a will, it is revocable, and of course not complete till the death of the testatrix, and therefore nothing can vest in the appointees or legatees till that time.

Vide *supra* 217,
Lord Ormond's
case, Hob. 348.

Vide *Oke v.*
Heath.
1 Vesey, 135.

I shall present the reader with the form of a deed of appointment made in pursuance of a power

a power reserved to a purchaser, who caused the original purchase deed to be made with this power, in order to prevent his wife from claiming her dower. A purchase deed of this nature we have already had an opportunity of explaining^p. With respect to the appointment and conveyance hereto subjoined, I must in the first place premise, that it should for the reasons given above, recite the instrument, by which the power is created; and where in the execution of a power the party is confined to observe any particular circumstances, as that of attesting the deed with such and such witness, &c. as the validity of the appointment depends upon a due observance of such circumstances^q, they should be carefully and fully recited, in order that it may appear upon the face of the deed, that they were strictly complied with. In the next place, as a power is at all times liable to be defeated, suspended, or destroyed, and as the estates created by it depend upon the strict compliance by the execution of the power with all the circumstances required by the instrument, which creates it, it seems prudent, and indeed now customary, to procure the person or persons in whom the legal fee is vested, subject to the power, to join in a conveyance of such legal estate by *lease and release*, so that if the execution of the power proves defective, and therefore void, still that the legal estate and possession may pass by virtue of the lease and release. This is endeavoured to be illustrated by the following precedent, which is a deed of appointment in pursuance of a power, and at the same time

^p *Supra*, 495.^q 1 P. W. 158.
Prec. Cha. 452.

time is a conveyance by lease and release of the legal estate and possession. With respect to the lease or bargain and sale for a year, I must refer, as to its form, to the one cited above.

THIS Indenture of three parts, made, &c. Between Matthew Mun of in the parish of St. Andrew's Holborn, in the county of Middlesex, Esquire, of the first part, Nathaniel Nore, of Gentleman, of the second part, and Peter Penny, of builder, of the third part : **Whereas** by indentures of lease and release, bearing date respectively, the 16th and 17th days of August now last past, the release being of three parts, and made between Charles Church, of Esquire, of the first part, the said M. Mun, of the second part, and the said N. Nore, of the third part, the messuages or tenements, lands and hereditaments, hereinafter mentioned or hereinafter granted, released, limited, and appointed, or expressed and intended so to be, were among other hereditaments conveyed and assured, and now are and stand limited **To the use** of such person or persons, for such estate and estates, interest and interests, and to and for such intents and purposes, and in such manner and form, as he the said M. Mun, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by him in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, or any writing in the nature, of, or put-

Recital of the instrument, which created the power.

purporting to be, his last will and testament, or any codicil thereto, to be signed, sealed, and published by him, in the presence of, and attested by, three or more credible witnesses, should direct, limit, or appoint; and in default of, and until such direction, limitation, or appointment, **To the use** of the said M. Mun and N. Nore, and the heirs and assigns of the said N. Nore for ever, **In trust** nevertheless, as to the estate and interest so thereby limited in use to the said N. Nore, his heirs and assigns, for and for the only benefit of the said M. Mun, his heirs and assigns, for ever, and to be conveyed and disposed of from time to time as he the said M. Mun, his heirs or assigns, should direct or appoint, and to, for, and upon no other use, trust, intent, or purpose whatsoever: **And whereas** the said P. Penny hath contracted and agreed to and with the said Mr. Mun, for the absolute purchase of the fee-simple and inheritance of the messuages or tenements, lands, hereditaments, and premises hereinafter particularly mentioned and described, and hereinafter granted, released, limited, and appointed, or expressed, and intended so to be, at or for the price or sum of £.3,000: **Now** this **Indenture witnesseth**, that for and in consideration of the sum of £.3000 of lawful money of Great Britain to the said M. Mun in hand paid by the said P. Penny, at or before the sealing and delivery of these presents, the receipt whereof he the said M. Mun doth hereby acknowledge, and thereof, and of and from the same, and every part thereof, doth acquit, release, and discharge the

said

Consideration;

Grant and appointment.

Release by the trustee.

Mention of the bargain and sale for a year.

· said P. Penny, his heirs, executors, administrators, and assigns, and every of them, forever, by these presents; and also for and in consideration of the sum of ten shillings of like lawful money, at the same time to the said N. Nore also paid by the said P. Penny; the receipt whereof is hereby acknowledged, he the said M. Mun, pursuant to, and in exercise and execution of the said recited power and authority given and reserved to him in and by the said hereinbefore in part recited indenture of release as aforesaid, and by force and virtue thereof, and of all and every other power and authority, powers and authorities, to him in that behalf reserved, or in him vested, or him in anywise thereunto enabling, **Doth** granted, bargained, sold, aliened, released, directed, limited, appointed, and confirmed, and by this present deed in writing, under his hand and seal, and by him duly signed, sealed, and delivered, in the presence of, and attested by the two credible witnesses, whose names are intended to be hereupon indorsed as witnesses hereto, **Doth** absolutely and irrevocably grant, bargain, sell, alien, release, direct, limit, appoint, and confirm; and the said N. Nore, at the request, and by the direction of the said M. Mun (testified by his being a party to, and sealing and delivering these presents) **Doth** bargained, sold, aliened, and released, and by these presents **Doth** bargain, sell, alien, and release unto the said P. Penny (in his actual possession now being, by virtue of a bargain and sale to him thereof made by the said M. Mun, and N. Nore, in consideration of five shillings, by indenture bearing

bearing date the day next before the day of the date of these presents, for the term of one whole year, commencing from the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession) and to his heirs and assigns, all those the messuages or tenements, &c. (*here describe the parcels*) together with all the houses, outhouses, offices, yards, ways, waters, watercourses, lights, easements, privileges, profits, commodities, advantages, emoluments, hereditaments, rights, members, and appurtenances whatsoever, to the said messuages or tenements, lands, hereditaments and premisses belonging, or in anywise appertaining, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or of any part thereof, and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits, of all and singular the said premisses; and also all the estate, right, title, interest, use, trust, property, possession, benefit, claim, and demand whatsoever, both at law and in equity, of them the said M. Mun and N. Nore, of, in, to, or out of the said messuages or tenements, lands, hereditaments, and premisses hereby granted, limited, and appointed, or expressed, and intended so to be, and every or any part thereof, **To have and to** Habendum.
hold the said messuages or tenements, lands, hereditaments, and premisses, with all and singular the appurtenances, unto the said P. Penny, his heirs and assigns, to the only proper use and behoof of the said P. Penny, his heirs

*Covenant that
the trustee has
done no acts to
incumber.*

heirs and assigns, for ever: **And** the said N. Nore for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said P. Penny, his heirs and assigns, that he the said N. Nore hath not at any time heretofore made, done, committed, executed, or willingly or knowingly suffered any act, deed, matter, or thing whatsoever, whereby, or by reason or means whereof the messuages, or tenements, lands, hereditaments, and premisses hereby granted and released, limited and appointed, or expressed and intended to be, or any part thereof, is, are, can, shall, or may be impeached, charged, incumbered, or in anywise affected in title, charge, estate, or otherwise howsoever: **And** the said M. Mun for himself, his heirs, executors, and administrators, doth hereby also covenant, promise, and agree, to and with the said P. Penny, his heirs and assigns, in manner following (that is to say) that for and notwithstanding any act, deed, matter, or thing whatsoever, made, done, executed, committed, occasioned, or suffered by him the said M. Mun, or the said N. Nore to the contrary, he the said M. Mun is lawfully seised of and entitled to the said messuages or tenements, lands, hereditaments, and premisses, in the manner and according to the form of the limitations in the before in part recited indenture expressed and contained, and that notwithstanding any such act, matter, or thing as aforesaid, he the said M. Mun now hath in himself good right, full power, and lawful and absolute authority

*Usual cove-
nants by the
appointor.
Vide supra, 518
in margine.*

to grant, bargain, sell, alien, release, direct, limit, and appoint the said messuages or tenements, lands, hereditaments, and premisses, and every part thereof, with the appurtenances, unto the said P. Penny, his heirs and assigns, in manner and form aforesaid: **And** also, that the said messuages or tenements, lands, hereditaments, and premisses hereby granted, released, limited, and appointed, or expressed and intended so to be, and every part thereof, with the appurtenances, shall from time to time, and at all times hereafter, remain, continue, and be unto the said P. Penny, his heirs and assigns, and shall and may be peaceably and quietly had, held, and enjoyed, and the rents, issues, and profits thereof, and of every part thereof, received, had, and taken accordingly, without any let, suit, trouble, denial, eviction, ejection, interruption, or disturbance, of, from, or by the said M. Mun, or his heirs, or the said N. Nore, or his heirs, or by any other person or persons lawfully or equitably claiming or to claim by, from, through, under, or in trust for him or them, and that free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise by him the said M. Mun, his heirs, executors, and administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, and all right and title of dower, uses, trusts, wills, intails, statutes-merchant, and of the staple recognizances, judgments, extents, executions, annuities, legacies,

legacies, payments, rents and arrears of rent, forfeitures, re-entries, cause and causes of forfeiture and re-entry, and of, from, and against all and singular other estates, titles, troubles, charges, and incumbrances whatsoever, had, made, done, executed, committed, occasioned, or suffered by them the said M. Mun, and the said N. Nore, or either of them, or by any other person or persons lawfully or equitably claiming or to claim by, from, under, or in trust for him or them : **And moreover,** that he the said M. Mun, and his heirs, and all and every other person or persons having or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title, trust, or interest, of, in, to, or out of the said messuages or tenements, lands, hereditaments, and premises, hereby granted, released, limited, and appointed, or expressed and intended so to be, or any part thereof, by, from, through, under, or in trust for him or them, shall and will from time to time, and at all or any time or times hereafter, upon every reasonable request, and at the proper costs and charges in the law of the said P. Penny, his heirs or assigns, make, do, acknowledge, levy, suffer, and execute, or cause or procure to be made, done, acknowledged, levied, suffered, and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfect, and absolute granting, releasing, conveying, assuring, limiting, and confirming the said messuages or tenements, lands, hereditaments,

Covenant for
further assurance.

ments, and premisses hereby granted, released, limited, and appointed, or expressed and intended so to be, and every part thereof, with the appurtenances, unto the said P. Penny, his heirs and assigns for ever, or otherwise, as he the said P. Penny, his heirs or assigns shall direct or appoint, be the same by fine, feoffment, common recovery, deed enrolled or not enrolled, or any other matter of record or not of record, or otherwise howsoever, as by the said P. Penny, his heirs or assigns, or either or any of them, or their or either of their counsel learned in the law, shall be reasonably devised or advised and required, so as such further assurance or assurances contain or imply no further or other warranty or covenant, than against the person or persons who shall be required to make and execute the same, and his, her, or their respective heirs, executors, and administrators acts and deeds only, and so as the person or persons who shall be required to make and execute any such further assurance or assurances be not compelled or compellable, for the making or doing thereof, to go or travel from his, her, or their respective dwelling or dwellings, or usual place or places of residence or abode: And the said M. Mun, for himself, his heirs, executors, and administrators, doth hereby further covenant, promise, and agree to and with the said P. Penny, his heirs, and assigns, that he the said M. Mun, his heirs, executors, administrators, or assigns, shall and will from time to time, and at all times or time hereafter, upon every reasonable request, and notice thereof in writing for that purpose given to him the said

Covenant to
produce title
deeds.

said M. Mun, his heirs or assigns, or some or
 one of them, by the said P. Penny, his heirs
 or assigns, or either or any of them, but at
 the costs and charges of the person or persons
 requiring or desiring the same, produce and
 shew forth, or cause or procure to be produced
 and shewn forth, to them, or either or any of
 them, or to such person or persons as they,
 or any of them, shall direct, desire, or re-
 quire, or at any trial, hearing, or examina-
 tion in any court of law or equity, or other
 judicature, or upon the execution of any
 commission, or elsewhere in England, as
 occasion shall be or require, the said recited
 indentures of lease and release, of the 16th
 and 17th days of August now last past, for
 the manifestation, defence, and support of
 the estate, right, title, interest, property, or
 possession of the said P. Penny, his heirs and
 assigns, of, in, or to the said messuages or
 tenements, hereditaments, and premisses
 hereby granted, released, limited, and ap-
 pointed, or expressed and intended so to be,
 with the appurtenances, unless the said M.
 Mun, his heirs, executors, administrators, or
 assigns, shall be prevented or hindered from so
 doing by casualties of fire, or other inevitable
 accidents: **And whereas** John Church, of
 —, esq; deceased, father of the before-
 named C. Church, being seised and possessed
 of (amongst other estates and hereditaments)
 the said messuages or tenements, heredita-
 ments and premisses, hereinbefore granted,
 released, limited, and appointed, by his last
 will and testament in writing, bearing date on
 or about the 2d day of September, 1771, did
 amongst

Recital of an
 outstanding
 term.

amongst other things give and devile unto Sir William Jones, baronet (amongst sundry other estates, hereditaments, and premisses) all and singular the premisses hereinbefore granted and released, with the appurtenances, **To hold** to the said Sir William Jones, his executors, administrators, and assigns, for the term of 1000 years, to commence from the said testator's decease, upon certain trusts therein particularly mentioned, which have been long since satisfied and discharged; and the said term by divers mesne assignments and assurances in the law (and particularly by a certain indenture of assignment of five parts, bearing date on or about the 10th day of August, now last past, and made or expressed to be made between the Rev. T. Tompson, of clerk, of the first part; W. Win, of esq; of the second part; the said C. Church, of the third part; F. French, of esq; of the fourth part; and R. Rogers, of the fifth part) hath been, and now is vested in the said F. French, his executors, administrators, and assigns, for all the residue and remainder now to come and unexpired of the said term of 1000 years, **In trust**, for the said C. Church, his heirs and assigns, or such purchaser or purchasers, or other person or persons, to whom the said several hereditaments, or the freehold and reversion or inheritance thereof were, or from time to time should be conveyed or assured, and to be assigned, surrendered, or otherwise disposed of from time to time, as he or they respectively, or his or their respective heirs or assigns should, as to their respective

respective parts of the same premisses, direct
 or appoint; and in the mean time, **In trust**
 to attend the inheritance of the same pre-
 misses, to protect the same from all mesne
 incumbrances (if any such there were,) **which**
 said term was by the before in part
 recited indenture of release, declared to be in
 trust for the said M. Mun, his heirs and as-
 signs, and from time to time, to be assigned
 as they should direct or appoint, and subject
 thereto; and in the mean time, **In trust** to
 attend and protect the inheritance from all
 mesne incumbrances (if any such there were):
And whereas it hath been agreed between
 the said parties to these presents, that the
 residue now to come and unexpired of the
 said term of 1000 years, so far as relates to
 the premisses hereby granted, released, li-
 mited, and appointed, or expressed and in-
 tended so to be, should remain vested in the
 said F. French, his executors, administrators,
 and assigns, upon the trusts, and in manner
 hereinafter expressed: **Now this Indenture**
further witnesseth, and for the considerati-
 ons hereinbefore expressed, it is hereby de-
 clared and agreed, and the said M. Mun, for
 himself, his heirs, executors, and admini-
 strators, doth hereby declare and direct, that
 the said F. French, his executors, admini-
 strators, and assigns, shall and do from
 henceforth stand possessed of, and interested
 in the said messuages or tenements, lands,
 hereditaments, and premisses hereby granted,
 released, limited, and appointed, or ex-
 pressed and intended so to be, or all such
 part or parts thereof as are or were so as
 afore-

aforesaid by the said recited indenture assigned to him, with the appurtenances, for all the now residue of the said term, **In trust** for the said P. Penny, his heirs and assigns, and to assign, surtender, and dispose of the same from time to time, as he or they shall direct or appoint, and subject thereto, **In trust** to attend, wait upon, and go along with the freehold, reversion, and inheritance of the same premises hereby granted, released, limited, and appointed, or expressed and intended so to be, in order to protect and preserve the same from all mesne incumbrances, (if any such there be.)

In witness, &c.

Covenant to stand seised to Uses.

THIS Conveyance, like a bargain and sale, does not operate by way of transmutation of possession, but derives its origin and efficacy merely from the doctrine and statute of uses. By virtue of the covenant a use springs up out of the seisin of the covenantor, which is immediately executed in cestuique use by the statute 27 H. 8. c. 10. A covenant to stand seised, and bargain and sale, are the only *independent* conveyances, which previously transfer the *use*, or which operate by way of transmutation of *use*. The only thing, which distinguishes these conveyances, at this day, is the *consideration*. Indeed, before the statute of *enrolments*, I apprehend, that they were distinguishable more by the words and form of the grant than by any other mark; for it is not an uncommon thing to find in the books, covenants to stand seised, made in consideration of *money*; whereas they can only be made in consideration of *blood or marriage* at this period, and a covenant to stand seised in consideration of money would to all intents and purposes be a bargain and sale within that latter statute. The conveyance by covenant to stand seised is now very seldom, if ever, resorted to: therefore, I shall only observe, that when
made

made by a tenant in tail it cannot produce a discontinuance, and when made by a tenant for life, it will not create a forfeiture, neither will it destroy any contingent remainders depending upon such life estate.

In order to render a covenant to stand seised effectual, the covenantor should have a vested estate in possession, reversion, or remainder ^a. Therefore a covenant to stand seised of such lands, as the covenantor shall afterwards purchase ^b, or of such particular lands, as he shall thereafter purchase ^c, in either case the covenant is void. It is said, that if a joint-tenant covenants to stand seised of the moiety of his companion after his death, it is void, although the covenantor survives ^d. Upon the same principle perhaps a covenant by a husband to stand seised of lands, that were conveyed to him and his wife after marriage, is ineffectual to raise uses. So if a man covenants, that after his death his heir shall stand seised to such and such uses ^e (without saying that *he* and his heirs will stand seised) or if he covenants to levy a fine to his son, who shall stand seised, &c. the covenant cannot raise a use in either case ^f.

^a 2 Co. 15. 4.

^b Moot, 342.
^c Cro. Eliz. 401.
^d 2 Roll. ab. 790.
^e pl. 8.

^f 2 Roll. ab. 790.
^g pl. 9.

^h Hob. 313.

ⁱ 3 Lev. 306.

With respect to this conveyance, it will be necessary briefly to consider. 1. What consideration is requisite. 2. By what words it may be created.

1. *What consideration is requisite.* The statute of enrolments intended to restore in some measure the notoriety of conveyances by feoffment and livery, and therefore enacted that all bargains and sales, which are made

upon a *valuable* consideration, should be enrolled. Now it is very obvious, that if a man were permitted, for a *pecuniary* or other *valuable* consideration, to raise a use by way of covenant to stand seised (to which conveyance the above statute does not extend ⁸) the statute of enrolments would have been easily avoided. Therefore, it has been held, that if a man in consideration of money *covenants to stand seised* to the use of another, this is a good bargain and sale within the statute ^h. But the consideration of blood and marriage was thought to be of a public nature, and was capable of raising a use by a covenant without the necessity of an enrolment: So that it may be deemed an invariable rule, that there are at this day but two considerations to raise uses by way of covenant to stand seised, viz. blood, and marriage ⁱ. Thus the considerations that lands should descend to the heirs male of the covenantor ^k, the consideration of brotherly love ^l, or of a marriage had or intended ^m, or of advancing the kin of the covenantor, or that the lands should continue in his name or blood ⁿ, are all good to raise uses by way of covenant.

We are to observe, that if the consideration appears, though there be no express words of consideration, yet it is sufficient to raise a use by way of covenant. Therefore if a man covenants to stand seised to the use of his son, cousin, daughter, wife, brother, mother, &c. without saying in consideration of the natural love which he bears towards them, this covenant is capable of raising the use ^o.

So also a consideration expressed for one may

⁸ Plowd. 307.

^h a last. 671.

ⁱ Carter. 139.

² Comm. 338.

^k Plowd. 309.

² Roll. ab. 785.

^l Plowd. 309.

² Roll. ab. 785.

^m Plowd. 301.

ⁿ Ibid. 309.

² Roll. ab. 785.

^o 7 Co. 40. b.

T. Jones, 105.

² Roll. ab. 782.

may extend to another, provided the other person be united to the covenantee by blood or marriage. Therefore if a man in consideration of natural love to his eldest son covenants to stand seised to the use of such eldest son in tail, and afterwards to the use of his younger son, here the consideration expressed to the elder extends to the younger son ^p. So if a man in consideration of affection to a son or brother covenants to stand seised to the use of such son or brother, and the wife of either, the covenant extends to the wife of the son or brother, and the use is well raised by it ^q: or if a man in consideration that B. will marry his daughter covenants to stand seised to the use of both, it is sufficient to carry the use to them accordingly ^r. But if a man for a good consideration to one person covenants to stand seised to the use of such person, and one or two more, who are not related to the covenantor or covenantee by blood or marriage, then the whole use will vest in the person, to whom the consideration extends. Therefore, if A. covenants to stand seised to the use of his son B. and also to the use of C. and D. who are strangers, the whole of the use vests in B. and nothing in C. and D. It seems, that if a man in consideration of money, and also of marriage, covenants to stand seised, the use will arise on the latter consideration only; therefore if the marriage does not take effect, the use will never vest, though the money be actually paid ^t. So a consideration consistent with the deed, or the considerations expressed in the deed, may be averred ^v.

^p 2 Roll. ab. 782. pl. 3.

^q 2 Roll. ab. 784 pl. 3.
 ^r Ibid. 783. pl. 1.

^s Ibid. 784. pl. 4.

^t Ibid. 783. pl. 4.

^u Moor, 1021.
 ^v Vide Plowd. 397.

^w 7 Co. 40. a.
 ^x 2 Roll. ab. 786.

As 790.

As to the considerations of friendship, long acquaintance, of being schoolfellows ^w, affection to a natural son ^x, that the king is head of the common-wealth ^y, that the covenantee out of the profits of the lands shall pay the covenantor's debts ^z, all these and the like are not sufficient to raise uses by way of covenant to stand seised. It is scarce necessary to notice, that a use cannot arise to a person, who is a stranger to the consideration. Therefore, if a man covenants to stand seised to the use of himself for life, remainders over to his relations, with a power for the tenant for life to make leases, this power is void in its creation ^a. This is a principal reason, why covenants to stand seised are fallen into disuse. We are to observe, that the consideration of natural love and affection is of itself sufficient to raise a use on a lease and release ^b: if therefore a man wishes to convey to his son for life, or in tail, it is the most eligible way to do it by way of lease and release; for by this conveyance he may reserve to the tenant for life or in tail a power to lease, or to make a jointure, which will take effect by way of limitation of a use out of the original seisin of the releasee.

Though a covenant to stand seised cannot at this day be made upon a pecuniary consideration, yet it seems that a feoffee, or bargainee, &c. may, in consideration of a sum of money, to be paid at a future day, covenant to stand seised, to the use of a particular person, which covenant may well raise the use upon payment of the money ^c.

2. By

^w Plowd. 302.

^z Roll. ab. 783.

^x Co. Litt. 123.

note B.

^y 2 Co. 15. a. b.

^z Moor, 194.

^a Leon. 195.

^a 2 Roll. ab. 260.

Cro. Jac. 181.

Supra,

^b Loyd v. Spil-

let.

^z Atk. 149.

Barn C. R. 384.

Vide 2 P. W.

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^c Moor, 35.

^a Leon, 25

^z Roll. ab. 786.

2. By what words it may be created.

The *consideration* in a covenant to stand seised is the chief requisite to support that conveyance, and therefore when a proper consideration appears, the words *covenant to stand seised* are by no means necessary, though at the same time it would be prudent to insert them. Thus, if a man, in consideration of natural love or marriage, *grants, bargains, sells, enfeoffs, and confirms*, with a clause of warranty in the deed^d; or if for the same consideration he *grants* and *assigns* a rent in fee^e, these, without the words *covenant to stand seised*, will vest the use in cestuique use.

B. n. c. 470;
Supra, 412, 413,
414.

^d 1 Vent. 137;
² Roli. ab.

^e 2 Vent. 150.
As to such conveyances as do not amount to a covenant to stand seised; vide the cases referred to

² Com. Dig. 456.

THIS Indenture made, &c. between John Jones of of the one part, and Lewis Lane and Matthew Moore of &c, of the other part, **witnesseth**, that the said John Jones, for the settling and establishing of all the messuages, farms, lands, tenements, and all other the hereditaments hereinafter mentioned, to remain and continue in the *blood* of the said John Jones in such manner and sort as is herein and hereby limited and expressed, and for and in consideration of the natural love and affection which he bears unto those to whom the estates are hereinafter limited, and for the advancement of Edward Jones his son, and others of his blood hereafter mentioned, he the said John Jones **doth** hereby for himself and his heirs **covenant, grant, and agree** to and with the said Lewis Lane, and Matthew Moore, and their heirs, that

that he the said John Jones and his heirs shall and will from henceforth stand and continue seised of and in all those the messuages, &c. (*here insert the parcels*), together with all and singular the appurtenances thereunto belonging, or in any wise appertaining, or reputed and taken as part or parcel thereof, to and for the uses, intents, and purposes hereafter limited, and to and for no other use, intent, or purpose whatsoever; that is to say, to the use and behoof of the said Edward Jones for and during the term of his natural life, without impeachment of, or for any manner of waste; and after his decease, then to and for the use and behoof of the first son of the said Edward Jones lawfully to be begotten, and to the use and behoof of the heirs male of the body of such first son; and for default of such issue (*and so on with the other limitations*). **Provided**, that if the said John Jones shall and do at any time hereafter declare unto the said Lewis Lane and Matthew Moore, or either of them, that he is intended to alter, or revoke any use, trust, clause, or limitation in these presents contained, by his writing indented, and by him sealed and delivered in the presence of two or more sufficient and credible witnesses, that then such addition, alteration, or revocation by him so made shall stand and be good and effectual in the law to all intents and purposes, any thing herein contained to the contrary in any wise notwithstanding. *In witness, &c.*

Vide 1 P. W.
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